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Editorial

We are very pleased to publish the first issue of the twenty-seventh volume of the *Coventry Law Journal*.

This issue contains pieces on a variety of legal topics, including the possible repeal of the Human Rights Act 1998 by two Steve Fosters! Steve Foster teaches at Manchester Grammar School and is a seasoned author on many aspects of the constitution and human rights law, and joins your editor-in-chief in appraising the government's latest plans to repeal the Act and replace it with a British Bill of Rights. The Journal also contains pieces on corporate manslaughter, human rights and the economy, freedom of expression, the impact of covid-19 regulation in Nigeria, EU Law, and Space Law.

We are particularly pleased to include an article by Professor Carlos Espaliú-Berdud, a visiting professor at Coventry University in the Centre for Financial and Corporate Integrity. A professor from the University of Nebrija in Madrid, he has written on the regulation of disinformation in Spain. We are also delighted to publish pieces by two practitioners: Dr. Konstantina Michopoulou, on forced labour and the European Convention, and Dominic Ruck Keene, who contributes a case note on coroners and Article 2 of the Convention. Our thanks go to them for sharing their professional and academic expertise.

This issue also includes case notes from our ex-colleague, Dr Ben Stanford, now at Liverpool John Moores University, and from Dr Gary Betts, our Head of Law at Coventry Law School. We have also included two book reviews, on Mothers in Prison, by our regular contributor Dr Rona Epstein, who comments on the texts in the context of her own impressive research into this area. Finally, we have included various student work in our Student Essays Section: from students at SWUPL in China and our students at Coventry University. Our thanks go to those students and the staff who co-ordinated those contributions.

Our thanks go to all our contributors: from academic staff (from the UK and abroad), practitioners and students. These contributions create a rich mix of academic and practical discussion that we hope will appeal to our varied readership.

On a sad note, we bid farewell to three colleagues who leave us for new academic adventures. Dr Katrien Steenmans, and Aaron Cooper, both experts in environmental law, and regular contributors to the Journal, have provided excellent support to our students, the School and our research and we wish them both well for the future. So too, we are very sorry to lose our research and teaching expert Dr Lorenzo Pasculli, who is leaving to take up a post at University College London: good luck Lorenzo.

We hope you enjoy reading this issue and we look forward to publishing your contributions in future issues. If you wish to contribute to the Journal and want any advice or assistance in publishing your work then please contact the editors: the next publication date is December 2022, and contributions need to be forwarded to the editors by early November 2022.

The editors: Dr Steve Foster and Dr Stuart MacLennan

ARTICLES

HUMAN RIGHTS

Reforming the Human Rights Act 1998 and the Bill of Rights Bill 2022

Steve Foster* and Dr Steve Foster**

Introduction

In previous issues of this journal we have chronicled the Government's recent plans to reform or repeal the Human Rights Act 1998 (HRA) and replace it with a British Bill of Rights. These articles included a detailed appraisal of the Independent Human Rights Act Review (IHRAR) and its potential,[1] and a retrospective of the United Kingdom's Human Rights record before the passing of the HRA in an effort to convince the reader that reform or repeal was neither necessary nor desirable.[2]

In the short period between those articles being published a great deal has happened; both generally in terms of our constitution, and specifically with further movement on the future of the HRA. Whether the former developments will mark the end of, or rather accelerate the plans for a Bill of Rights, will remain to be seen. Whatever happens in the next six or twelve months, we are bound to return to the proposals and the possibility of introducing changes whereby our system of protecting human rights is less reliant on the rights in the European Convention of Human Rights 1950 (ECHR) and the case law of the European Court of Human Rights (ECtHR). At the very least too much discussion has taken place in the last two years over the role and status of human rights in our legal system and constitution, and the relationship between the courts and the executive and Parliament, for the idea of reconstructing our framework for human rights to disappear.

This article will provide the reader with a critical review of these proposals, including what has happened most recently with respect to the government's ideas for reform, together with the political and academic reaction and opposition to such proposals. It will then examine the government's recent Bill of Rights Bill 2020, which before the summer recess proceeded through a rather distracted Parliament, in order to examine its central provisions and then allow us to imagine what a British Bill of Rights might look like. Finally, the article will offer reflections on the proposals, the Bill, and the debate about the appropriateness of retaining Convention rights and principles. In particular, it will examine the power of the ECtHR, and the question of whether the domestic judiciary has become too involved with political and moral considerations after the passing of the 1998 Act and the influence that the European Court has had on human rights adjudication.[3]

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[1] Steve Foster, 'Long in the making: the ''Gross Review'' and Conservative Party policy on the reform of human rights law' (2021) 26 (1) Cov. Law J 17.

[2] Steve Foster, 'Should it go or should it stay? The coming of age of the Human Rights Act 1998, or time to say goodbye?' (2022) 26 (2) Cov. Law J 23.

[3] At the time of writing there are ongoing political and legal developments relating to this issue. including the Government's response to the Joint Committee on Human Rights Report - *Human Rights Act Reform: Government Response to the Committee's Thirteenth Report of Session 2021-22* - HC 608 (Session 2022-23) 14 July 2022, and the Committee's *Call for Evidence - Legislative Scrutiny: Bill of Rights Bill, 14 July 2022.*

The Independent Human Rights Act Review

The IHRAR was the Government's initial response to its electoral commitment to 'update' the HRA. The then Justice Secretary, Mr. Robert Buckland, in contrast to the bellicosity and triumphalism elsewhere across Whitehall, took a modest approach to reform. In addition to retaining the UK's membership of the ECHR, which implied that the Convention's substantive rights were now settled, the Review's terms of reference (ToR) gave no sense that the word 'update' could be extended to include the possibility that the HRA might be repealed, let alone replaced by a new Bill of Rights. Perceptions of moderation are endorsed by the IHRAR itself, which emphasises that its ToR, expressed in neutral language, neither begged questions nor suggested predetermined answers.

However, hopes that the Government might continue to take a considered and informed approach to reform were dashed in the weeks following the delivery of the Review's final report to Mr. Buckland's successor, Mr. Dominic Raab, in October 2021.[4] Under his stewardship, the Ministry of Justice opted for a radically different approach to updating the HRA, strongly influenced by the new Justice Secretary's own thinking.[5] This culminated in the publication on 14 December 2021 of a separate Consultation Paper (hereafter 'CP').[6] Continued movement along the IHRAR's preferred direction of travel had encountered a major roadblock. Its passenger – domestic rights protection - was unceremoniously pulled from the vehicle and hurriedly bundled into another, which set off in a new direction. A signpost marked its route: 'Home-grown, British Bill of Rights – this way'.

Reactions to the CP were decidedly 'mixed'. Whilst broadly welcomed by Policy Exchange,[7] Professor Tom Hickman spoke for many when he expressed puzzlement over the Government's determination to dismiss the IHRAR.[8] Hickman calculated that twenty-one of the twenty-nine questions that structured the CP fell outside the Review's ToR and were not therefore considered by it. This was still more troubling given the Review's membership (including its 'formidable' chair, Sir Peter Gross), the depth of its research, and the detail in which its findings were presented.[9] The CP – in Professor Hickman's words 'sketchy and half-baked' - inevitably suffered by comparison. Unperturbed, the Government proceeded with its consultation exercise, eventually extended to 19 April 2022. According to its Consultation Response (hereafter 'CR'),[10] hundreds of stakeholders were invited to ten consultation events, along with several meetings hosted by ministers themselves. A total of 12,873 responses were received.[11] The Ministry then drafted a Bill of Rights Bill, included in the Queen's Speech to "…restore the balance of power between the legislature

[4] Ministry of Justice *The Independent Human Rights Act Review,* December 2021, CP 586.
[5] Shortly before entering Parliament in 2010, Mr. Raab cemented his standing on the libertarian wing of the Conservative Party by publishing *The Assault On Liberty*, a personal and highly polemical account of the evolution of human rights law in both Britain and Europe. From even the briefest of readings, especially Chapters 5-7, one can detect the book's influence on current Government policy.
[6] Ministry of Justice *Human Rights Act Reform: A Modern Bill of* Rights, December 2021, CP 588.
[7] See Richard Ekins, *Thoughts on a Modern Bill of Rights*, Policy Exchange (2022), para. 6.
[8] 'A UK Bill of Rights?' *London Review of Books*, Volume 44, Number 6, 24 March 2022.
[9] The Panel had thirty-eight initial conversations with interested parties, who made over 150 responses. It also conducted fourteen 'Roundtables' and seven online 'Roadshows', along with various conversations with Strasbourg, German and Irish judges. Unsurprisingly, its report is substantial; running to over 400 pages along with additional information set out in no fewer than eleven appendices.
[10] Ministry of Justice *Human Rights Act Reform: A Modern Bill of Rights – Consultation Response* June 2022, CP 704.
[11] Ibid, paras. 3-5.

and the courts". It was formally introduced in the House of Commons one month later on 22 June.

Progressive critics dismissed the Bill as '…part of a wider No. 10-led strategy to focus on…divisive issues in the hope of shoring up support among socially conservative voters'.[12] Yet, there was also cross-party Parliamentary criticism of Mr. Raab's refusal to publish a draft Bill to facilitate pre-legislative scrutiny, including from Sir Bob Neill, the Conservative Chair of the Commons' Justice Select Committee.[13] Whilst the Government seems confident that it can rely on its Commons' majority to push the Bill on to the statute book,[14] it seems wise to have introduced it to MPs, thereby bringing into play s.2 of the Parliament Act 1911.[15] As peers go on to scrutinise its details, reflecting no doubt on the meaning and implications of the word 'update', the Government might have need of it.

Pause for thought

The IHRAR offers the most comprehensive assessment of the HRA yet undertaken. Consequently, we should pause to reflect on its analyses and the recommendations flowing from them, Its ToR fell under two heads. The first concerned s.2 HRA, which when determining questions arising from Convention rights, requires domestic courts to take into account ECtHR case law. As part of a drive to promote greater 'public ownership' of human rights, the Review proposed to amend s.2(1) to better develop domestic human rights jurisprudence.[16] This would have required domestic courts to first apply UK statute, common and case law before, should it be necessary, looking to the ECHR itself.[17] This is relatively uncontentious: giving effect to Convention rights by the HRA was not intended to replace our legal order with the ECHR and the jurisprudence of the European Court. Critically, and despite the 'myth-making' surrounding this issue, neither was this the intention of the ECHR, which to this day plays a subsidiary role in resolving human rights questions. ECHR rights and principles guide the passing, interpretation and application of domestic law ensuring as far as possible, compatibility with ECHR law, although – again a point of great importance - under s.3 of the HRA as it stands, domestic law is persuaded to find compatibility with ECHR law in ways which were unimaginable before the Act was passed. The reason for that of course was to avoid potential conflict with decisions of the Strasbourg Court, an objective that will still be relevant even if the Bill becomes law, as the Government currently has no plans to leave the Convention.

[12] Peter Walker, 'The Queen's speech 2022: what is in it and what it means', *Guardian*, 22 May 2022.
[13] Rajeev Syal, 'Raab urged to let Parliament scrutinise Human Rights Act replacement', *Guardian*, 21 June 2022.
[14] The largest of any government since Mr. Blair's second ministry in 2001 and the largest of any Conservative government since Lady Thatcher's third in 1987.
[15] This, of course provides that a Bill sent up to the House of Lords by the House of Commons could become law despite the Lords not approving the Bill.
[16] Former Supreme Court Justice, Lord Carnwath, is critical of the Review on this point.
[17] See the indicative draft clause at CP 586 Chapter 2, para. 199. The IHRAR acknowledges the Supreme Court's judgments in *Osborn v Parole Board* [2013] UKSC 61, [2014] AC 1115 and *Kennedy v Information Commissioner* [2014] UKSC 20; [2015] AC 455, which it believes should be given statutory effect. These decisions reflect the need to apply and interpret domestic law in the resolution of the dispute before the court, rather than resolving it by recourse to Convention rights. Thus, in *Kennedy*, it was stressed that despite the relevance of Article 10 rights, it did not follow that the relevant section should be remoulded by the courts to provide such rights. In view of the clarity of the absolute exemption in the Act, the focus would be on the 2011 Act.

The IHRAR also expressed confidence that under an amended s.2(1), any risk domestic courts might 'race ahead' of Strasbourg would be countered by judicial restraint.[18] Developments to the *Ullah* doctrine play their part in this.[19] This doctrine represents the 'mirror' principle, that decisions of the domestic courts should so far as possible, mirror the decisions of the ECtHR, and that the courts should, in the absence of special circumstances, follow any clear and constant Strasbourg jurisprudence. This pragmatic approach avoids potential conflicts with and subsequent appeals to Strasbourg, although other decisions have stressed that the rights in the HRA are not simply ECHR rights, but can be interpreted as domestic rights.[20] No other changes to s.2, however, were recommended. Instead, the Review concluded that in interpreting s.2, judges have acted with appropriate restraint. This is reiterated in the related evaluation of the *domestic* margin of appreciation.[21] In rejecting the use of statutory guidelines to 'police' this margin, the majority argued that for the most part domestic courts '…have developed a careful and cautious approach…(and) have shown proper consideration of their role and those of Parliament and the Government'.[22] On a related matter, it regrets that neither the high standing of UK judges in Strasbourg nor the latter's receptiveness to their thinking are sufficiently appreciated by domestic audiences.[23] For this reason, at Chapter 4 it recommends that the current judicial dialogue between the two continues to develop 'organically', i.e. without political intervention.[24] Of course, such dialogue between the Convention authorities and the UK, and the principle of subsidiarity in general, is accommodated by the admissibility procedure (including the new Protocol No. 15) and the margin of appreciation provided to Member States, and has been a constant topic of discussion with Member States since the Brighton Declaration.[25]

Secondly, the ToR required consideration of the HRA's impact on the UK's 'constitutional balance'. Its conclusion – summarised at para. 7 - reflect the majority's view that no substantive case exists either for repeal or *major* amendment of the key sections, there being little to no evidence that the courts are misusing either s.3,[26] or s.4.[27] The Panel agreed that early interpretations of s.3 had resulted in judicial overreach, most obviously in *R v A (No.*

[18] Per Lord Reed in *Elgizouli v Secretary of State for the Home Department* [2020] UKSC 10; [2020] 2 WLR 857. For example, in *R (Anderson and Taylor) v Secretary of State for the Home Department* [2202] 1 WLR 1143, it was held by the Court of Appeal that it would be wrong to find the Home Secretary's power to set tariffs for mandatory life sentences incompatible with the ECHR whilst the European Court found it acceptable. Subsequently, the House of Lords declared that power incompatible after the European Court had found it in breach of Article 6 ECHR: [2002] 3 WLR 1800.

[19] The *Ullah* doctrine had been reiterated recently in *R (AB) v Secretary of State for Justice* [2021] UKSC 28, where the Supreme Court held that in the absence of a clear ruling from Strasbourg, the solitary confinement of young persons in detention could not automatically constitute inhuman and degrading treatment within Article 3 ECHR.

[20] See *R (Nicklinson) v Ministry of Justice* [2015] UKSC 38, where it was stressed that the Court was not bound to follow the Strasbourg decisions on assisted suicide; although ultimately it did in granting judicial deference to Parliament in this area.

[21] CP 586, para. 29.

[22] Ibid, para. 31. This is more commonly referred to as judicial deference.

[23] Ibid., para. 38.

[24] Ibid, para. 35.

[25] European Court of Human Rights: *High Level Conference on the Future of the European Court of Human Rights: Brighton Declaration*, 19/20 April 2012.

[26] Ibid, Chapter 5, para. 79. In only 24 cases have the courts used s. 3 to interpret legislation compatibly with Convention rights, ibid, para. 67.

[27] Ibid, para. 68. In particular, the majority rejected Policy Exchange's contention that the courts had ignored Lord Steyn's warning in *Ghaidan,* reiterated by Lord Neuberger PSC in *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38, that s.4 should be used only in exceptional circumstances. They paid particular attention to the fact that from 2000-20, only 28 unappealed declarations were made by the courts in respect of legislation in force at the time they were made: a yearly average of 1.4.

2).[28] In this case the House of Lords managed to add to the words of a statute – s. 41 of the Youth Justice and Criminal Evidence Act 1999 – so as to allow a defendant to use evidence of a victim's previous sexual behaviour and to thus enhance his right to a fair trial. Whilst the majority of their Lordships were accused of judicial legislation, it should be remembered that the alternative was to declare the provision incompatible under s.4 HRA, leaving Parliament to face the uncomfortable reality that its law was probably inconsistent with Article 6. Further, the IHRAR felt that the *Ghaidan*[29] guidelines subsequently brought both stability and a proper balance. These are based on the idea that possible interpretations of domestic statutes must comply with the intention and policy of the Act itself. Thus, in *Ghaidan*, the House of Lords held that the relevant provision of the 1977 Rent Act could be interpreted to comply with the HRA; as such an interpretation was consistent with the underlying social policy of providing security of tenure.[30]

Consequently, s.3 required a simple amendment, as per the modified s. 2(1)) to clarify the order of interpretive priority: the court first applying the normal principles of interpretation and only referring to s.3 should these fail to remove the incompatibility.[31] Similarly, the majority felt that s.4 was wholly consistent with the court's historical discretion to grant declaratory relief. Hence, its only proposal was for a discretionary power enabling the courts to make 'ex gratia' payments following a declaration of incompatibility,[32] to provide the complainant with a remedy for the loss suffered. Finally, the IHRAR rejected suggestions for repealing or modifying s.19 HRA.[33] Other recommendations included amending s.14 HRA to enable the court to suspend quashing orders following successful challenges to designated derogation orders; a similar provision being recommended for the quashing of subordinate legislation. A database was also recommended, detailing the use of quashing powers.[34] Finally, the Review recommended a minor amendment to s.10, preventing ministers from issuing remedial orders that amend the HRA itself. The Review did criticise some aspects of the current arrangements, notably the concept of extra-territoriality in ECtHR jurisprudence:

> The current position of the HRA's extra-territorial application is unsatisfactory, reflecting the troubling expansion of the Convention's application. The territorial scope of the Convention ought to be addressed by a national conversation…together with Governmental discussions in the Council of Europe, augmented by judicial dialogue between UK Courts and the ECtHR.[35]

In similar vein, it added that '…the temporal application of the HRA is (also) now uncertain and unsatisfactory. Clarity is needed. The temporal scope of the Convention ought to be addressed at a political level by the UK and the other Convention states.'[36] Tellingly,

[28] [2001] UKHL 25, [2002] 1 AC 45.
[29] *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 577.
[30] This was not possible with respect to the Matrimonial Cause Act 1971 which allowed marriage between a 'man and a woman' and which it was argued validated marriages entered into by transsexuals with a person of the same biological sex. Such an interpretation would have conflicted with the fundamental purpose of the Act: *Bellinger v Bellinger* [2003] 2 AC 467.
[31] CP 586, Chapter 5, para. 186
[32] Ibid, para. 205.
[33] Ibid, paras 158 and 161.Section 19 requires ministers to make a declaration of compatibility or incompatibility of any legislation introduced to Parliament.
[34] Ibid., Chapter 8, paras 80, 85-6
[35] Ibid, para. 4.
[36] Ibid.

however, it warned against seeking easy answers through unilaterally amending domestic human rights law.[37]

Its main criticism, however, was the strong perception among sections of public opinion that the HRA lacked legitimacy and relevance.[38] It added that such perceptions do not reflect reality and should be challenged and dispelled.[39] Consequently, despite falling outside its ToR, it strongly recommended the rolling out of a programme of civic education – with the active support of all three Branches of State - designed to improve public understanding of human rights.[40] It is striking therefore that the Review's two most important recommendations would not have required major reforms to the HRA itself. This reflected the majority's conviction that the HRA has been an overall success.[41] Further, the arguments for repeal to – either extend current protections or return to pre-1998 arrangements – were rejected on the grounds that no evidence of any depth of support was provided for either.[42] The Review was particularly opposed to a reliance on common law protection alone, noting that '…the UK's current approach and the Human Rights Act, stands fairly in comparison with the best developing global practice in human rights protection'.[43] Finally – a point of the greatest significance - the IHRAR emphasised that for as long as the UK retains its membership of the ECHR, the national interest lies in consistent decision-making between UK courts and Strasbourg. Any other position would raise the prospect of the UK breaching its international obligations, thereby defeating the HRA's primary purpose: 'bringing rights home'.[44]

Four threats and a case for change

As noted above, the Review's findings cut little ice with a Ministry of Justice now firmly under new management. Although not universally welcomed in right-wing circles, the Government committed itself instead to replacing the HRA with a Bill of Rights.[45] Section 2 of the Bill places into domestic law what the Government calls the 'fundamental rights' protected under the HRA. These are set out in Schedule 1 and described as 'Convention rights'. Its case for change is rooted in the assertion that these 'fundamental rights' are under threat - not from the Government but, irony of ironies, from human rights law.

Four, broad claims are made in support of this position. Firstly, human rights law has encouraged a 'rights culture', detaching rights from the ethos of civic and personal responsibility. Secondly, it has impacted adversely on public service delivery, causing confusion, uncertainty and risk aversion among officials. This threat is associated with a third - the compromised ability of government to protect the public. Three problems in particular are highlighted in the CP. The first follows the 'Threat to Life' notification, per ECtHR judgments in *Osman v United Kingdom,*[46] and *Z v United Kingdom.*[47] In these cases,

[37] Ministry of Justice *The Independent Human Rights Act Review – Executive Summary*, December 2021, CP 587, para. 85
[38] CP 586, Chapter 1, paras. 47-8.
[39] Ibid, para. 49.
[40] Ibid, paras 54 and 57.
[41] CP 587, para. 9.
[42] CP 586, Chapter 2, para. 19
[43] Ibid, para. 22.
[44] Ibid, para. 32.
[45] See, for example, Richard Ekins and John Larkin QC, *Human Rights Law Reform – How and Why to Amend the Human Rights Act 1998* (Policy Exchange, 2021), especially at para. 2
[46] (2000) 29 EHRR 245.
[47] (2002) 34 EHRR 3.

the ECtHR held that a State had, through its national authorities, a positive obligation to protect the life of those within its jurisdiction from threats from other private individuals, disturbing in the process legal immunities granted to various public bodies when carrying out their public functions.[48] The second is the extension of the territorial scope of the ECHR following *Al-Skeini and others v United Kingdom.*[49] In this case, the ECtHR held that a jurisdictional link existed between the United Kingdom and Iraqi civilians killed by British soldiers during security operations in Iraq. This allowed it to find a breach of Article 2 ECHR on the grounds that the UK had failed to conduct an independent and effective investigation into the deaths of relatives of five of the six applicants. The third and final problem concerns the difficulties, arising largely from Article 8 ECHR, barring the deportation of foreign national offenders (FNOs)[50]. Whilst Parliament had legislated to guide the courts in interpreting Article 8,[51] this had failed to prioritise 'public interest considerations' in deportation cases.

The fourth and final threat is the inability of elected politicians to remedy these problems. Several cases are listed in this respect, including *P v Cheshire West and Chester Council; P and Q v Surrey County Council.*[52] In this case, the Supreme Court attempted to lay down the criteria for determining whether the living arrangements made for mentally incapacitated people amounted to a deprivation of their liberty under Article 5 ECHR, a task which many regarded as outwith the Court's constitutional and practical competence. The CP also argues that even when judgments are in the government's favour, time and scarce resources have been consumed contesting them. On this point, it refers to Lord Reed's comments in *R (SC and others) v Secretary of State for Work and Pensions,*[53] criticising welfare organisations for bringing political cases to court. In this respect, it must be noted that some human rights claims inevitably raise social and economic issues, given that the enjoyment of civil and political rights, such as the right to private life and freedom from inhuman and degrading treatment, are informed by the values of economic and social rights. In such cases, it is essential that someone draws the boundaries of entitlement and although that is done initially by law-makers, the courts must play a role in ensuring that human rights law and principles (whether from the ECHR or elsewhere) are respected. Lord Reed's comments are acceptable and understandable if they reflect the need for judicial deference in these areas, but that does not justify taking away the courts' jurisdiction to adjudicate on such cases.

A 'Living Instrument'

The principle source of these threats is the ECtHR's 'living instrument' doctrine, all too evident in judgments such as *Othman v United Kingdom,*[54] and *Hirst v The United Kingdom* (No. 2).[55] Whilst the CP acknowledges that such judgments are few in number, it points to their 'qualitative' dimension, straying as they do into ultra-sensitive policy areas. Not for the first time, however, the Government's analysis struggles to withstand close scrutiny. For

[48] See *Hill v Chief Constable of West Yorkshire* [1990] 1 WLR 946 (police immunity) and *X (Minors) v Bedfordshire CC* [1995] 2 AC 693 (immunity for social services).
[49] (2011) 53 EHRR 18, overturning the decision of the House of Lords in *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 46.
[50] From April 2008 to June 2021 28 per cent of deportation cases involving foreign nationals were successfully appealed. Of the latter, 40 per cent were allowed on human rights grounds alone.
[51] Most obviously, the Immigration Act 2014 s. 19, which added Part 5A to the Nationality, Immigration and Asylum Act 2002: the new ss. 117B-C being particularly significant in restricting the courts' ability to block deportations on human rights grounds.
[52] [2014] UKSC 19.
[53] [2021] UKSC 26.
[54] (2012) 55 EHRR 1.
[55] [2004] 38 EHRR 40.

example, the *Othman* ruling in Strasbourg represented no more than a difference of opinion with our courts with respect to the application of Article 6 ECHR when a foreign court was in danger of using torture evidence during a criminal trial. The domestic courts felt that the use of such evidence would not, inevitably, lead to a violation of Article 6,[56] and the Strasbourg Court felt otherwise. In other words, the domestic courts had already embarked on an inquiry as to the acceptability of such evidence, as it had done previously with respect to its use in domestic proceedings.[57] The Government's main cause for concern in these cases is, therefore, that it agreed with the Supreme Court, and lost the case in Strasbourg. Similarly, in *Hirst,* although the European Court and Grand Chamber were not prepared to provide an unlimited margin of appreciation to the UK with respect to prisoner voting rights, both the Court and the Council of Europe were at pains to point out that the State's main obligation was to consider a less disproportionate and less arbitrary alternative.

The Government asserts that the problems arising from ECtHR doctrine have been amplified by the HRA, especially ss.2-3. Whilst recognising the retreat from the 'maximalism' of *Ullah*[58], s. 2 remains ripe for reform on grounds of: ambiguity, over-reliance on Strasbourg case law and blocking the development of domestic human rights jurisprudence (assuming that it is no more generous). The CP is even more critical of s.3, responsible for granting the courts a 'broad licence' to re-write domestic law, even in cases where Parliament's intentions are clear.[59] The HRA is also criticised for failing to provide a 'positive steer' on how the court should locate the public interest in human rights cases, a criticism already noted in the area of deportation. The Government is particularly concerned that too many judgments disregard the irresponsible behaviour of claimants. Accordingly, remedial action requires the imposition of statutory guidance when interpreting limited and qualified rights and, in some instances, awarding remedies. We shall see below that the real intention here is simply to stop altogether claims from those the Government regards as 'undeserving'.

Repeal and replace: what a modern Bill of Rights looks like (apparently)

This, then, is the basis of the claim that only through 'repeal and replace' can domestic human rights law be redirected to its proper purpose. Reform proposals are set out in Chapter 4 of the CP. While these have been superseded by the publication of the Bill, this section follows that Chapter's structure: helpful in tracking the evolution of Government's thinking.

Human rights, the common law and the role of the UKSC

The HRA is repealed at para. 2 of Schedule 5 of the Bill. Whilst the substantive rights it protects are retained, they will be in future interpreted and applied under very different arrangements. The first aspect of these is a strengthened role for the common law, complemented by provisions reinforcing the supremacy of the Supreme Court. Here, the Government's proposals go much further than those of the IHRAR, effectively 'de-coupling' Convention rights from Strasbourg case law. The key provisions are found at s.1(3) and s.1(2)(a), read alongside s.3(1). These affirm that ECtHR case law neither forms part of domestic law nor impacts upon Parliament's ability to legislate and, further, that the Supreme Court has judicial authority over questions involving Convention rights. Strasbourg's authority is further reduced by s.24, which specifies, firstly, that no account

[56] *R (Othman) v Secretary of State for the Home Department* [2010] 2 AC 110.
[57] *A v Secretary of State for the Home Department (No. 2)* [2010] UKSC.
[58] *R v Special Adjudicator ex parte Ullah* [2004] UKHL 26, [2004] 2 AC 323
[59] This is despite accepting that the 'high water mark' of judicial expansionism occurred in *R v A (No. 2)* [2001] UKHL 25, a case that is now two decades old.

can be taken of interim measures when determining Convention rights and obligations, and, secondly, that the court cannot have regard to such measures when granting relief. This was introduced following the ECtHR's intervention on 14 June 2022 to halt the deportation of an asylum seeker to Rwanda. The hysteria over that judgment is, of course, all the more remarkable since the ECtHR had merely halted the deportation until the applicants received the decision of the domestic courts at a full judicial review hearing.[60] The importance of common law developments in rights protection is also re-emphasised at s.3(2)(b)-(c).

As anticipated by the IHRAR, by introducing these provisions the Government runs the risk that the domestic courts will be as, or even more rights-friendly than Strasbourg. However it obviously wishes for the best of both worlds: domestic courts ignoring Strasbourg case law when it conflicts with domestic law, and a return to a compliant judiciary who will follow Parliament's will and not use human rights principles to contort the strict meaning of the law. We will see later that whilst it may be twenty years too late for that, other provisions of the Bill might still allow the Government to neuter the judiciary and get its way regardless. Further, the court is required to comply with s.9, which states that Article 6 ECHR rights can be secured by a limited right to a jury trial. This provision is part of a long line of proposals to include the 'British' right of trial by jury in the more general European right to a fair trial. It is an obvious attempt to 'trump' the ECtHR's judgment in *Taxquet v, Belgium*,[61] which suggested that a defendant was entitled to question the basis on which a lay tribunal had come to its decision of guilt. The practical benefit of this provision seems limited, as the jury system in the United Kingdom has never, in general, been in question. In any case, the section's inclusion is difficult to reconcile with ministerial distrust of jury acquittals in recent public order cases.

Similarly, at s.4 the court must give 'great weight'[62] to the importance of protecting the right to free speech,[63] though not freedom of expression more widely defined.[64] This significantly amends s.12(4) HRA, which states that the courts must have particular regard to freedom of expression, but which has had little effect on elevating the Article 10 right when in conflict with other rights.[65] Freedom of speech is already protected by s.12 HRA, and journalistic sources are protected under s.10 of the Contempt of Court Act 1981, in line with Strasbourg case law.[66] Nevertheless, the augmentation of press freedom is welcome, even though it clashes with the Government's idea that human rights often conflict with crime prevention and detection. In particular, the Government has been concerned with the development of a domestic law of privacy at the expense of free speech and press freedom,[67] although there is no specific mention of this in the Bill. On the face of it, the obvious beneficiary will be the print media; the obvious losers, those seeking to use Article 8 ECHR to protect their right to a private life and confidentiality of personal information. The print media also benefits from s.22, which largely replicates the current s.12(2)-(3), which provides

[60] *NSK v United Kingdom* (application no. 28774/22).
[61] [2010] ECHR 1806, (2012) 54 EHRR 26.
[62] With the exception of criminal proceedings: s. 4(3).
[63] Defined in the Bill as '…a right to impact ideas, opinions or information be means of speech, writing or images'. Fulfilling the same goals by peaceful protest, for example, is not according to the Government an equally precious liberty and not meritorious of the same level of protection.
[64] CP 704, para. 45.
[65] See *Douglas v Hello! Magazine* [2001] 2 WLR 992 and *Re S (Publicity)*[2005] 1 AC 593
[66] *Sunday Times v United Kingdom* (1979) 2 EHRR 245; *Goodwin v United Kingdom* (2002) 35 EHRR 18.
[67] See the recent Supreme Court decision in *Bloomberg v ZXC* [2022] UKSC 5, which provides a starting point of expectation of privacy in cases where individuals are under police investigation, but have yet to be charged.

protection to those defending privacy and other cases by making it difficult for the courts to make orders in the defendant's absence, and to award interim injunctions pending full trial.[68]

Fundamental rights

The CP argues that focus on fundamental rights is blurred by two types of claim: the trivial and the undeserving.[69] The first is addressed at s.15(1), which requires judicial permission before human rights cases can proceed. Under s.15(3), this can be granted only where the claimant has suffered significant disadvantage from an unlawful act, a provision that is similar to the new admissibility criteria, under Protocol No 15, that applies to applications to Strasbourg.[70] When interpreting this provision, the court must satisfy itself that the ECtHR would agree that the 'significant disadvantage' test has been met.[71] Whilst cases can proceed where significant disadvantage is absent, '…reasons of wholly exceptional public interest' must exist. The effect is that Convention rights can be breached without an effective domestic remedy, something with implications for rights protected by Article 13, which provides that everyone is entitled to an effective remedy including facilitating claims for breach of their Convention rights: this applying whether the eventual claim is successful or not. The restrictions on admissibility must also be read alongside s.14, which will be evaluated below. Finally, whereas the Government originally intended to complement the 'permissions stage' by reforming s.8(3) HRA, ultimately it opted instead to reform the arrangements for awarding damages.[72]

Other provisions aimed at fundamental rights can be found at s.5(1), which restrict the court's ability to create positive obligations. Thus, post-commencement, Convention rights cannot be interpreted to require public authorities to comply with a 'positive obligation': defined at s.5(7) as an obligation to do any act. Further, the court must give great weight to avoiding existing ('pre-commencement') interpretations if compliance has any one of five consequences, e.g. impacting on the ability of public authorities to perform their functions or requiring them to conduct an inquiry or investigation to a particularly high standard.[73] This refers to a number of decisions of both the ECtHR and the domestic courts, which impose an obligation on a public authority to secure the ECHR rights of individuals, and thus negate claims of immunity in such cases. Sadly, this proposal seems clearly aimed at (re)granting immunities to public authorities (the police, and possibly social service providers) who can currently be sued under the HRA for failing to protect victims from threats to their life, or inhuman and degrading treatment.[74] Such institutions are already provided with a good deal of deference and flexibility in carrying out their duties, and cases

[68] Such orders should not be granted before trial unless the claimant is 'likely to succeed' at full trial*: Cream Holdings v Banjaree* [2005] 1 AC 253.
[69] We consider this below when examining the changes to the law on remedies. It has also expressed specific disapproval of the recent European Court of Human Rights decision in *ML v Slovakia,* Application No 34159/17, where the Court held that the press had interfered with a deceased priest's Article 8 rights in irresponsibly reporting on true allegations of historical sexual abuse.
[70] It should be stressed, however, that the admissibility procedure under the ECHR exists on the understanding that the ECHR process is subsidiary to domestic protection; it does not thus go without saying that domestic law must apply the same standard of admissibility at the leave stage.
[71] The CR (at para. 53) explains that 'The permission stage will be partly modelled on, and expressly linked to the jurisprudence under, the Strasbourg Court's admissibility criterion on 'significant harm'.
[72] CP 704, para. 60.
[73] The full list is set out at s.5(2).
[74] See the Supreme Court decision in *DSD v Commissioner of the Police for the Metropolis* [2018] UKSC 11, which found the police liable under the HRA (Art. 3 ECHR) for failing to properly investigate allegations of rape and sexual assault.

against them rarely succeed, unless there is evidence of systemic failure.[75] Re-instating these immunities will, it is argued, deprive victims of an effective remedy for systemic failures and encourage negligent practice among public authorities. We shall see below that proposals to prevent human rights from being used to bring claims on overseas military operations can be criticised on similar grounds, and will hardly be popular with the families of armed personnel who have brought claims under the Act.[76]

Preventing the incremental expansion of rights

The majority of the Bill's measures fall under this head. Primarily, the Government changed its original position and decided to scrap s.3 HRA completely. The need for this U-turn is unclear. Whilst it is true that the Act allows the courts a wider power to interpret away conflicts with ECHR rights, this was always subject to Parliament's right to re-legislate in clearer terms. In addition, s.3 cannot be used to simply make legislation 'better' or more compatible with ECHR rights. Thus, before s.3 can be used, the court must be satisfied that a specific provision of the legislation appears to be incompatible.[77] It is significant therefore, that Parliament chose to exercise this in very limited circumstances, accepting in the vast majority of cases that the interpretation was needed to secure fair trials, the presumption of innocence, and same-sex rights. Be that as it may, however, in future the '….courts will no longer have additional interpretive powers to change the interpretation of legislation to make it compatible with the Convention rights'.[78] In this way, the Bill aims to ensure that domestic courts cannot interpret laws in ways that were never intended by Parliament. Thus, our courts will revert to traditional principles of interpretation that respect parliamentary, in reality executive, sovereignty. The CR acknowledges this has implications for existing interpretations made under s.3. Consequently, s.40 empowers ministers to preserve via subordinate legislation interpretations that are '…an established part of the legislative scheme'.[79]

It will be interesting to discover in due course which interpretations meet this criterion. The devolved assemblies will also note that the removal of s.3 will not apply to legislation under the devolution acts. As a result, declarations of incompatibility[80] become the court's only means of challenging primary legislation incompatible with Convention rights.[81] In the CP, the Government had also considered making declarations the sole option for responding to rights-incompatible subordinate legislation. Eventually, this was rejected in favour of giving the court the *option* at s.10(1)(b)(ii) of declaring any item of subordinate legislation incompatible rather than invalidating or disapplying it. This measure obviously ignores the potential for interpretation offered by traditional principles of statutory interpretation and common law development, yet the Government fully intends that the courts will respect their new restrictive constitutional remit.

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[75] See, for example, the decisions in *Osman,* above and *Van Colle v Chief Constable of Hertfordshire* [2008] 3 WLR 593 (approved in the European Court).
[76] *Smith v Ministry of Defence* [2013] UKSC 41.
[77] See the recent High Court decision in *R (on the application of Friends of the Earth Ltd) v Secretary of State for the Business, Energy and Industrial Strategy* [2022] EWHC 1841 (Admin), where it was held, obiter, that s.3(1) did not allow a court to adopt an interpretation of a provision in order to be more conducive to or more effective for the protection of an ECHR right, or, in this case, to minimise climate change impact.
[78] CP 704, para. 70.
[79] Ibid, para. 71.
[80] Now provided for by s. 10 of the Bill.
[81] For reasons that will become clear below, this provision should be read alongside s. 7.

The Government also rejected the IHRAR's recommendations for a separate regime of suspended and prospective-only quashing orders,[82] and clarification of the scope of remedial orders.[83] However, it is the refusal to re-introduce s.19 HRA that catches the eye. In future, ministers will no longer have to make compatibility statements. The CR criticises current arrangements for being simplistic and failing to '…encourage innovative and creative policy making'.[84] This conclusion seems rather odd, in that in both practice and in theory s.19 had little impact as such statements were not legally enforceable and were made very rarely. Equally, the additional political 'cover' provided to ministers when introducing legislation likely to breach Convention rights is all too apparent.

The language of both the CP and CR presents repeal as a means of empowering the domestic courts.[85] Yet, it is clear that the latter will be prevented from taking advantage of their new-found discretion. If a domestic human rights jurisprudence develops, it will do so under executive direction, as the following examples covering some of the Bill's most important provisions hopefully illustrate. A general duty of deference is created under s.1(2)(c), which requires the court to give 'great weight' to the principle that Parliament should take '…decisions on different policy aims, different Convention rights and the Convention rights of different people': a duty amplified at s.7. More specific duties are contained in s.3. Under s.3(2)(a) the courts must have particular regard to the text of the Convention, with the option of using the *travaux preparatoires* as an interpretive aid. This limits the prospect of a domestic 'living instrument' doctrine. This is complemented by s. 3(3-4). With the exception of free speech, the court can expand current protection under Convention rights only where it has no reasonable doubt that the ECtHR would concur. The implications for the separation of powers and the independence of the judiciary is, of course considerable, particularly under a constitution that sets no formal restrictions on the power of Parliament to pass law, and where the executive dominates Parliament.

Section 3(2)(c) is more significant still. This requires the court to comply with several duties under ss.4-8. The provisions of some of these – s.4 ('Freedom of speech') and s.5 ('Positive obligations') – have been considered above. The restrictions imposed by s.6 ('Public protection') are particularly interesting since, as the CR acknowledges, they were not included in the consultation.[86] In future, when considering the rights of convicted prisoners, '…the court must give the greatest possible weight to the importance of reducing the risk (they pose) to the public', especially with respect to decisions not to release them or move them to a particular part of a prison, e.g. a separation centre.[87] This flies in the face of the jurisprudence of the ECHR, which has stressed that restrictions on Convention rights must meet the requirements of legality and necessity laid down in the ECHR itself.[88] It further reverses the long struggle for prisoners' rights witnessed from the 1980s, which reflected the case law of the Strasbourg Court and the development of administrative justice in the British Constitution.

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[82] Provision already existing in the Judicial Review and Courts Act 2022.
[83] The use by Ministers of the power to issue remedial orders is exercisable only where there are 'compelling reasons' for doing so: see s. 26(2)-(4).
[84] CP 704, para. 88
[85] This can be seen for example, in s. 1(2)(a), s. 3(1), s. 1(2)(b), s. 1(3) and s. 3(3)(b).
[86] CP 704, para. 16
[87] This duty does not apply, however, to the rights in Articles 2, 3, 4(1) and 7
[88] See *Golder v United Kingdom* (1975) 1 EHRR 524; although the Court has accepted that the enjoyment of prisoners' right can be restricted by the ordinary and reasonable requirements of imprisonment, for example visiting rights: *Boyle and Rice v United Kingdom* (1988) 10 EHRR 425.

Section 8 focuses on the deportation of FNOs. Two new tests apply whenever a case concerns the compatibility of legislation with Article 8 ECHR. Under s.8(2), when considering the impact on a qualifying member of the deportee's family, the court cannot find incompatibility unless it considers that the legislation would result in '…manifest harm…that is so extreme that the harm would override the otherwise paramount public interest in removing (the) P(erson) from…the United Kingdom.' The term 'extreme' must be interpreted as both exceptional and overwhelming, and either incapable of being significantly mitigated or otherwise irreversible. The second (additional) test applies when the court is considering the meaning of extreme harm in relation to family members other than qualifying children. Here, the test can be met '…only (in) the most compelling circumstances' where it is impossible for the court to reasonably conclude that the harm caused is sufficient to outweigh the public interest in the deportation. With remarkable understatement, the Government describes these tests as 'a high constitutional ceiling'.[89] Thus, under s.20(2) the court must dismiss deportation appeals unless it believes that the deprivation of the right to a fair trial would be so fundamental as to amount to a nullification. Similarly, under s. 20(3) where a deportation decision has been informed by an assurance, the court must, one, presume that ministerial assessments of that assurance are correct and, two, treat the assurance as determinative and accordingly dismiss the appeal. The court can rule that this threshold has not been met only when it cannot reasonably conclude that the assurance would prevent a fundamental breach of Article 6 amounting, once again, to a nullification. This is an astonishing rejection of due process, and again flies in the face of clear Strasbourg jurisprudence that insists that executive assurances cannot be regarded as final in assessing whether there is a risk to an individual's human rights being breached.[90]

In this way, s.8 fulfils the Government's pledge to make it harder for FNOs to frustrate deportation processes, making it easier to deport them whilst simultaneously restricting the circumstances in which their right to family life would trump the need to remove them. This will mean – so the Government promised earlier - that under future immigration laws, to evade removal an FNO would have to prove that a child or dependent would come to overwhelming, unavoidable harm if they were deported. This, it was argued, will curb the abuse of the system that has seen those convicted of hurting their own partners and children evade removal by claiming it would breach their right to family life in the UK.

Yet, as noted above, domestic legislation already exhorts the courts to give limited weight to such claims, possibly in breach of the separation of powers and certainly at risk of violating ECHR rights. Further, the threshold of overwhelming, unavoidable harm will almost certainly breach our obligations under the ECHR; because it will not allow a suitable balancing act to take place. In addition, it must not be forgotten that the overwhelming number of claims in these cases are already rejected by the courts on the grounds that they are outweighed by the public interest in deportation or extradition. Nevertheless, the government may wish to further reduce the courts' powers to prevent deportations for reasons of preserving the rights to family life, particular after the recent decision of the Supreme Court in *HA (Iraq) v Secretary of State for the Home Department.*[91] In this case, it was stressed that although the court had to recognise that the threshold for the level of harshness justifiable in the context of the public interest in the deportation of foreign criminals was highly elevated, it could still take into account factors such as the rehabilitation of the offender. Further, in order to prove "undue harshness" it was not

[89] CP 704, para. 114
[90] *Chahal v United Kingdom* (1997) 3 EHRR 413
[91] [2022] UKSC 22.

necessary to show a degree of harshness going beyond that which would necessarily be experienced by any child faced with the deportation of a parent.

We explained earlier that the power to issue declarations of incompatibility must be read alongside the new s.7. In the CP, the Government argued that the HRA had failed to guide the courts in interpreting qualified and limited rights, i.e. where Convention rights had to be balanced against public policy considerations, other Convention rights and the rights of different groups. This claim is simply untrue, as several judgments have clarified where that balance lies and what principles can be used to elucidate the court's reasoning in such decisions.[92] The confusion, of course, is essentially caused by the Government's disturbing refusal to accept, or even read, the jurisprudence, on the basis that the courts should not involve themselves with matters of weight, degree and balance. Section 7 applies when considerations concerning the compatibility with the Convention of a primary law (or the act of a public authority in accordance with it), involve one or more of the three 'balance' questions listed above. Accordingly, the court must regard Parliament as having decided that merely in passing it, the primary law strikes an appropriate balance, whilst simultaneously giving the greatest possible weight to the principle set out in s.1(2)(c), i.e. that decisions about how such a balance should be struck are properly made by Parliament. In the language of the CR: the '…courts should give deference to… (Parliament's) view'.[93] Such warnings, are of course, unwritten rules of most constitutions, imploring the judiciary to carry out its role (and power to question and quash legislative acts) in a manner that is mindful of the democratic role of law-makers and the executive. However, in a constitution that lacks an entrenched legal power of judges to question legislative acts (and executive acts that are clearly bestowed by Parliament), this provision effectively sounds the death knell for judicial review.

We turn now to the court's *powers* in human rights cases, beginning with its power to rule that public authorities have acted incompatibility with Convention rights.[94] The CP makes clear that public authorities deserve greater protection when giving effect to or enforcing incompatible subordinate legislation in those cases where primary legislation prevents the removal of the incompatibility. This is achieved in s.12(2)(b)(ii), which extends the arrangements under s.6(2)(b) HRA. These currently provide that it is not unlawful for a public authority to act in a way which is incompatible with a Convention right if, one, it could not have acted differently in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights; and, two, it was acting so as to give effect to or to enforce those provisions. The other change, at s.12(5), is to the definition of 'act', which excludes interpretations of legislation. However, to reiterate, the greatest protection is at s.1(2)(b) and s.3(2)(a), which remove '…the UK courts' power to interpret legislation in ways that are not in line with the ordinary meaning of words and the overall purpose of the statute'.[95] The effect of this provision is to give greater power for public authorities to transgress ECHR rights, in the knowledge that the domestic courts will not strain the language of legislation allowing such.

[92] See Lord Steyn in *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, and Lord Bingham in *A v Secretary of State for the Home Department* [2005] 2 AC 68, who both provide very clear guidance on the principles of proportionality and judicial deference.
[93] Ibid.
[94] This is unlawful under s.12(1).
[95] CP 704, para. 98.

Sections 14 and 20 limit the court's powers in other ways. Under s.14 the court cannot grant permission to bring actions in relation to acts in the course of overseas military operations, certain acts within the British Isles wholly for the purposes of overseas military operations, and inquiries or investigations into either.[96] Restrictions are also placed on an individual's ability to bring proceedings on behalf of another.[97] As we have noted above, this provision is in response to a number of court rulings that have established liability and provided remedies for violation of Convention rights. Its inclusion, however, is still surprising. The unsatisfactory nature of a purely domestic response to extra-territoriality was noted by the IHRAR and in both the CP and CR. The Government claims that it needs to '…signal at domestic level our commitment to the principle that claims relating to overseas military operations should not be brought under human rights legislation'.[98] This implies that anyone wishing to pursue such a claim must proceed directly to Strasbourg, where government defeats would appear inevitable. Anticipating this, the CR states that 'alternative remedies' will be made available through later legislation and further that s.14 provisions will not be brought into force until these are in place.[99] A more likely explanation for the inclusion of s.14 is to signal ministers' belief that such actions should not be entertained at all under human rights legislation; in other words that these matters should be non-justiciable, by both our courts and Strasbourg. However, as we shall see, plans to reduce the applicability of human rights law at the domestic level are worthless if indeed such a reduction conflicts with the case law of the ECtHR, and the possibility of 'appeal' to Strasbourg is still available.

Rights and Responsibilities

As mentioned above, the CP argues that fundamental rights have been undermined by a focus on trivial and undeserving claims. We have seen how s.15 aims to curb the first of these. The second is the subject of s.18, which modifies the court's duty at s.17 to grant a remedy that is 'just and reasonable'. In particular, the court is directed to consider the seriousness of the effects of the breach before determining the appropriateness of a particular remedy.[100] This takes several forms. Firstly, at s.18(1), with the exception of Article 5 (liberty and security of the person), the court may award damages only where the victim has suffered loss or harm as a result of the breach. Secondly, the existing directions at s.8(3)-(4) HRA are tightened, as under s.18(1)(b), the court must satisfy itself that without awarding damages it would be unable to provide a just and reasonable remedy. Further, under s.18(2) it cannot award an amount greater than the ECtHR would have done.[101]

However, the main changes occur at s.18(5)-(7). These amplify s.8(3) HRA which require the court to take into account all the circumstances of the case, including the consequences of the award. At s.18(5) 'circumstances' expressly includes the public authority's efforts to avoid the breach, the seriousness of its effects and critically '…any conduct of the person that the court considers relevant (whether or not the conduct is related to the unlawful act)'.[102] The last of these makes good the CP's argument that only deserving victims of

[96] The new restrictions can be found in s.14(2) and (4)
[97] Section 14(3).
[98] CP 704, para. 102.
[99] Ibid, para. 103. The question then will be whether the ECHR Machinery regards them as 'effective' remedies.
[100] CP 704, para. 118.
[101] This seems an extraordinary sentiment, given that the Government so distrusts the Convention and the Court and its jurisprudence.
[102] This provision is made at s. 18(5)(a).

breaches should receive compensation. The CR notes that the past conduct of the claimant, including conduct in the distant past, is now included in the circumstances of the case,[103] irrespective of its relevance to the facts or the breach itself. Its implications for British justice, including the rule of law, are profound. The message is: regardless of your loss or the harm suffered, don't expect redress if the court considers you 'a wrong 'un'. This was a key reason why the idea of a bill of rights and *responsibilities* was rejected by the Joint Committee in the past; that it is the antithesis to all human rights treaties and instruments – fundamental rights for all. More specifically, no particular right is excluded, so that this principle could be used when absolute rights are violated, thus in breach of clear Strasbourg rulings to that effect.[104]

Finally, under s.18(6)-(7) the court has a duty to '…give great weight to the importance of minimising the impact…any…award of damages would have on the ability of…any …public authority to perform its functions'. In addition, '…the court must have regard (in particular) to future awards of damages which may fall to be made in cases involving issues that are the same as, or similar to, those involved in the unlawful act'. Thus, not only is the Government desirous of excluding public authority liability for human rights violations, it further wishes the courts to reduce the amount of damages when such authorities are found in violation. As we have seen, the ECHR and the HRA already allow some of these factors to affect just satisfaction, but these measures contradict justice and effective remedies and will often conflict with the initial finding of fault and violation.

The cases for and against reform

In addition to the criticisms made in the preceding commentary, the Government's position is vulnerable on any number of additional points. These include the decision to dispense with the expertise of the IHRAR[105] the rushed nature of the CP and the inadequacy of its supporting evidence,[106] ministerial disregard for the lack of support emerging from the consultation, and, most worryingly, their dismissal of the many strengths of the existing arrangements. Crucially, key judgments of the ECtHR revealed '…the many gaps in the protection given by…(domestic) laws',[107] whilst giving grateful ministers the 'cover' to implement reforms in the teeth of opposition from vested interests.[108] Similarly, the CP

[103] CP 704, para. 124.
[104] *Chahal v United Kingdom*, see n. 90 above.
[105] In his lecture, *Is it time for a new British Bill of Rights?* (9 February 2022), Lord Carnwath describes the IHRAR as '…a thorough and painstaking review of the question of the HRA in the domestic courts, and brings together a wealth of valuable material and insights'.
[106] This point is made by several critics including Professor Hickman (above), who argues that the Government's reference to two, key immigration cases, including *R (OO (Nigeria) v Secretary of State for the Home Department* [2017] EWCA Civ 338 does not withstand close scrutiny. In *OO*, the Court of Appeal held that it would be a disproportionate interference with the Article 8 ECHR rights of foreign criminal to remove him under s.94 of the Nationality, Immigration and Asylum Act 2002 *pending the pursuit of his appeal against deportation (italics added).* In the Court's view, *the best interests of his son* prevailed over the strong public interest in removal of a foreign criminal, and given the mitigation as regards the offence, the offender's conduct in relation to it and his conduct since it was committed. In *Unuane v United Kingdom*, Application No. 80343/17, 24 November 2020, although the applicant successfully argued that his removal from the UK was a disproportionate interference with family life because it separated him from his children, The European Court rejected his claim on the compatibility of the Immigration Rules with the ECHR, showing the deference shown by the Court, and the domestic courts in these cases.
[107] See for example, Steve Foster, 'The Protection of Human Rights in Domestic LAW: Learning Lessons from the European Court of Human Rights' [2002] NILQ 236, and Francesca Klug 'The Long Road to Human Rights Compliance' [2006] NILQ 186.
[108] Ibid, Lord Carnwath,

downplays the role of the HRA ('…a simple and elegant way of consolidating (Convention) rights within… (UK) law')[109] in bringing about significant improvements to individual lives. The JCHR, to cite but one source, has recently highlighted the Act's many benefits: enabling enforcement of Convention rights in domestic courts, reducing the number of cases being sent to Strasbourg, enabling UK courts to influence Strasbourg jurisprudence and focusing the attention of public authorities on human rights. On this last point, the JCHR maintains that the main problem concerning the so-called 'rights culture' is that, at least with regards to the attitudes of public officials, it has by no means spread as far as it should.[110]

It also remains unclear how the Bill will bring about the changes ministers most desire. It is the case that s.3(2) – when read alongside s.3(3)(b) – invites the court to start again the business of (re)interpreting the meaning of Convention rights. The provisions in s.6 generate still stronger pressure in this respect. The Government appear to desire a return to the pre-HRA situation where the courts were constrained in using ECHR law specifically and human rights law more generally. Yet, it must be asked whether it is possible to return to that situation having had over 20 years of case law that has accepted and expanded on the jurisprudence of the ECHR. This has created a judicial approach barely recognisable in the pre-Act era; an approach, of course, that was needed to accommodate the passing of the Act and reduce conflicts with the Strasbourg Court? [111] This question is all the more pertinent given the presumption that Parliament does not intend statutes to lead to breaches of the UK's international obligations. A partial answer lies in s.40, at least in respect of interpretations that appear to the Secretary of State to have been made in reliance on s.3 HRA. We shall shortly see, however, that this provision also raises many other questions, with disturbing implications both for British democracy and the rule of law. The HRA's repeal also has adverse implications for the political stability of the Union. This is most obviously so regarding Northern Ireland, where rights protection is bound up with the peace and Brexit processes. However, as Professor Gearty explained as long ago as 2016, since Whitehall is re-asserting its role as the arbiter of rights protection for all British peoples, the Bill risks alienating still further political opinion in Scotland.[112]

A still greater problem, however, stems from the Government's commitment to continued membership of the ECHR, which exposes it to the accusation of wanting to "eat its cake and have it, too".[113] On the one hand, it wishes to protect its international standing and much-vaunted 'soft power'. On the other, it wants domestic human rights law to develop separately from Strasbourg jurisprudence. Even assuming that the domestic courts take the hint and reinterpret Convention rights restrictively, neither the CP nor the Bill explains what prevents frustrated litigants seeking redress before the ECtHR. As Lord Carnwath points out, the number of applications and adverse judgments both seem certain to increase.[114] Consequently, far from shielding the Government from the ECHR, the relatively narrow gap between domestic and European human rights jurisprudence is likely to widen once again, thereby diminishing both the standing of the UK courts and the wide margin of appreciation currently accorded them. Lurking in the background, as Professor Hickman

[109] Ibid.
[110] Joint Committee of Human Rights, *Human Rights Act Reform*, Thirteenth Report of Session 2021-22, 30 March 2022, paras 14-18.
[111] See Foster and Klug, note 107 above.
[112] Conor Gearty, 'The Human Rights Act Should Not Be Repealed', *U.K. Const. L. Blog* (17th September 2016) (available at https://ukconstitutionallaw.org/).
[113] These include Lord Sumption: see his 'Foreword' to Ekins and Larkin, *Human Rights Law Reform*: Policy Exchange's contribution to the IHRAR.
[114] Ibid, Lord Carnwath.

reminds us, is Article 13 as interpreted and applied by the ECtHR in *Jones v United Kingdom*.[115] So glaring are these problems in fact, one wonders whether the Bill is little more than a staging post preparing the ground for eventual withdrawal from the ECHR itself?

Why, therefore, is the Government pressing ahead with a reform certain to be exposed during its Parliamentary passage and, even should it become law, is unlikely to ease Mr. Raab's frustrations? Ministers argue that the Bill merely fulfils a manifesto commitment, which itself expresses Conservative policy dating from June 2006. Far better explanations, it seems to us, lie with personality and politics.[116] For Mr. Raab himself, demoted in September 2021 for his role in the Afghanistan debacle, the sweeping rejection of the IHRAR was a good starting point on the road to political redemption. Mr. Raab is a long-standing opponent of the HRA, with strongly Thatcherite views on the State (limited but authoritarian) and the constitution (political not legal). Secondly, the Bill seems part of the ongoing 'culture war'; the Government presenting the HRA as something fundamentally un-British, whose benefits have been largely confined to undeserving minorities, successfully abusing the system with the connivance of out-of-touch elites. Thirdly, it can be seen as 'settling scores' with the senior judiciary. The rebuff delivered by the Supreme Court in *'Miller 2'*[117] was followed only three months later by the Conservatives' first convincing general election victory for thirty-two years.[118] Clipping judicial wings by repealing the HRA was all the more attractive since other possible reforms - diminishing the Supreme Court's status and politicising the judicial appointments process -carried far greater political risks.[119] Further, criticism of domestic judicial power enables ministers to direct some of their fire on Strasbourg and in the process, remind voters of the seemingly permanent threat posed to Britain's sovereignty by anything European.[120]

The Bill, however, has a more sinister side. Aside from its indifference to its own rule-breaking,[121] the second Johnson ministry has been notable for its concerted executive 'power grab'. Selected examples must suffice to make this point. The prospect of voter suppression and campaign manipulation is raised by ss.1, 3 and 16-17 of the Elections Act 2022. The court's power to grant relief in asylum appeals has been already reduced by ss.26-8 of the Nationality and Borders Act 2022. One also notes the use of the 'ouster clause' at s.2 of the Judicial Review and Courts Act 2022 and again at s.3 of the Dissolution and Calling of Parliament Act 2022. Finally, whilst it has 'flown under the radar', Mr. Raab's proposed reforms of the parole system are indicative of a mind-set in which the only check

[115] [1986] 8 EHRR 123. Professor Hickman suggests that regardless of the hopes the Government might have for its Bill of Rights, Strasbourg will continue to insist that the ECHR continues to be given effect in UK law.
[116] Ibid.
[117] *R (Miller) v Prime Minister* [2019] UKSC 41.
[118] Mr. Johnson's second ministry found itself buoyed by the Conservative party's largest Commons' majority since the 1987 Parliament, in turn built on the highest number of votes received in a general election since 1992 and its highest share since 1979.
[119] Shortly into his role as the new President of the Supreme Court, Lord Reed expressed his opposition to either renaming the Supreme Court or allowing MPs and ministers greater input into judicial appointments.
[120] One marvels at the thought of Leon Trotsky's reaction to the idea of Brexit as 'permanent revolution' within British politics.
[121] The House of Lords Appointments Commission was ignored regarding the ennobling of Lord Cruddas; the Prime Minister overruled his own advisor on ministerial ethics, Sir Alex Allan, over the conduct of the Home Secretary, Priti Patel; and although it backfired spectacularly, he later sought to press Government business managers to alter the process by which MPs are disciplined for breaching accepted standards. 'Party-gate' is of course a story in itself.

ministers seem willing to countenance is the potentially manageable one occurring every 4-5 years in the form of a general election.[122]

The Bill of Rights Bill is part of this pattern. Primarily, it places the executive as far as possible, beyond the control of the courts in cases raising Convention rights. The HRA's sponsoring minister, Jack Straw, clarified that the Act had been designed in part to counter the dilution of rights protection caused by the centralisation of power in ministerial hands. Above all, it was intended to make the executive '…far more accountable for its acts and omissions to its citizens'.[123] Consequently, as Sacha Deshmukh (Amnesty International's Chief Executive) has pointed out, its repeal denies the public '…its most powerful tool to challenge wrongdoing by the government and other public bodies'.[124] In addition, it strengthens ministerial control of how the court interprets Convention rights. In this respect and in addition to ss.1-3, the proposed s.40 is an especial course for concern. Aside from its lack of clarity,[125] critics note the remarkable 'Henry VIII' quality of a provision, which:

> '…grants the Secretary of State discretionary powers to enact their own interpretation of the law. They are free to 'save' only those elements of s.3 interpretations they deem desirable and purge what remains by omission. This could leave legislation changed beyond recognition and operating in a manner that bears little resemblance to the statute passed by Parliament or the 'relevant judgment' the Secretary of State is supposedly preserving. As long as the stated intention is even a tokenistic 'saving' of some element of a s. 3 interpretation, the Secretary of State could enact their interpretation of the law by altering primary legislation'.[126]

It seems axiomatic that giving the executive powers held historically by Parliament and the courts is to put it mildly, extremely problematic.

Ultimately, however, the Bill reveals how contemporary Conservatism understands both rights protection and the concept of rights itself. One: depending upon the harm caused and the characteristics and circumstances of the victim, breaches of rights – though unlawful – become legally permissible. The Law Society notes on this point, the heightened risk of public authorities knowingly breaching rights, confident they are unlikely to be called to account.[127] Two: when the breach is caused either directly or indirectly by primary legislation, ministers will determine whether if at all, changes to the law will be made. It follows that where they are unprepared to introduce 'corrective' legislation, in the circumstances of the case, the right concerned becomes legally unenforceable: a question of justice being transformed into a question of politics. In a populist era where electoral minorities confidently assert the right to speak for everyone else, the vulnerability of the politically marginalised can be easily guessed at. Three: the Bill of Rights expresses a British

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[122] Ministry of Justice, *Root and Branch Review of the Parole System*, March 2022, CP 654. Mr. Raab plans to limit the Parole Board's power to release so-called 'first-tier offenders', whilst simultaneously increasing his own power to intervene in individual cases. One option under consideration is that the Justice Secretary, supported by two nominal independents who nonetheless he would appoint, will form an appeal panel to review release decisions in what are described as 'challenging cases'.

[123] See CP 586, Chapter 1 para. 24.

[124] *The Law Society Gazette* news desk, 22 June 2022.

[125] In particular, it is unclear whether it once the Bill comes into force, all existing interpretations of Convention rights made using s. 3 cease to have legal effect and can only be restored by subordinate legislation.

[126] Stefan Thiel, 'Henry VIII on steroids - executive overreach in the Bill of Rights Bill', *U.K. Const. L. Blog* (6th July 2022) (available at https://ukconstitutionallaw.org/)

[127] *The Law Society Gazette* news desk, 22 June 2022.

version of 'originalism'. When interpreting Convention rights, the court is pressed to set aside not just twenty years of domestic case law but also over seven decades of social and cultural evolution. Under s.3(2)(a) fully enforceable rights seem confined to interpretations acceptable to British legal and political elites in the late 1940s, who enjoyed their formative years in the late Victorian or Edwardian eras. In this way, a distinctly Conservative view of the rule of law emerges, amounting to the fetishization of Parliament. Accordingly, the rule is satisfied whenever Parliament is happy to legitimise the policies of the executive, no matter how partisan, authoritarian or discriminatory. Pertinently as we approach the first centenary of his death, one's thoughts are drawn to Lord Salisbury.[128] Notorious for his manipulation of senior judicial appointments, Salisbury had a very clear view of the British constitution: the governing party was fully entitled to the political 'spoils'. In this way, Salisbury embodied a Conservative tradition lacking commitment to the separation of powers and at best, showing ambivalence towards balancing them.[129] His ghost, it seems, once again walks abroad.

Conclusions: reforming the Act and retaining membership of the Council of Europe and the European Convention

Whilst agreeing with the above analysis and commentary on specific proposals and clauses of the Bill, your second commentator would make the following observations and criticisms. These proposals are aimed at restoring national sovereignty and the supremacy of our judges and the legal system in determining the limits of human rights. The Government has had enough of the Convention, the European Court, and the principles of human rights it uses to uphold Convention rights, including the weight it attaches to rights and the type of individual it allows to claim those rights. Yet the Government, at present, are certain of one thing:

> 'This will be achieved while retaining the *UK's fundamental commitment to the European Convention on Human Rights (author's italics)*

At present the ECHR operates primarily at the international law level, the UK is a member state and agreed to uphold ECHR rights and accept the jurisdiction of the European Court if it finds against us. In addition, our domestic law is influenced by the ECHR and the European Court because the Human Rights Act 1998 gives effect to ECHR rights and our judges have to take into account ECHR case law and rights. If the HRA was repealed, which because of sovereignty, is possible, it will be replaced by a Bill of Rights which would contain British rights (not ECHR rights). They will be similar (the right to a jury trial will be included, despite the outrage caused by juries failing to convict protestors for criminal damage), but our courts would follow these rights and not be so influenced, if at all, by the ECHR and Court. Those rights will be diluted in certain cases where that would conflict with the public interest, and/or where irresponsible law-breakers try to assert them. If we stayed in the ECHR, individuals could still bring cases to the European Court and we would be bound in international law to abide by any decision. Therefore, repeal of the HRA would need to be careful, so that our domestic law is not in breach of the ECHR, and our international obligations. The Government says the Bill and laws will not conflict with the ECHR, but of course, they will, as that is the whole point of questioning European human rights law and repealing the Act. If we left the ECHR then the Government believe that it

[128] Robert Gascoyne-Cecil, 3rd Marquess of Salisbury (1830-1903) was Conservative prime minister on three occasions between June 1885 and July 1902.
[129] Robert Stevens, 'Government and the Judiciary', in Vernon Bogdanor (ed.), *The British Constitution in the Twentieth Century* (Oxford), 2003, 335.

could pass whatever (human rights) legislation it wanted. However, we are still a member state of various UN human rights treaties, so would risk being in breach of those treaties. We would also face international criticism, and being (further) ostracised and humiliated, for not abiding by international law.

Which brings us to the government's 'moral' argument - it is wrong to be led and influenced by European Law and judges and we should be led instead by British values - not least, of course, parliamentary - or rather executive - sovereignty. The recent intervention on sending asylum seekers to Rwanda is a prime example. On the other hand, the ECHR and its 'incorporation' into domestic law has provided an objective safeguard against executive power over human rights, based on principles established by a treaty that the UK was instrumental in constructing, and which operates very much like a bill of rights, which everyone but the UK has in its constitution. All Council of Europe states (bar Russia) adopt the ECHR as the basis of their human rights, and accept the Convention and its case law as a necessary safeguard for protecting rights and balancing them with other rights and interests.

Some say that the recent plan is no more than an effort to stop judicial and political regulation of governmental power, as happens in every other formal and effective constitution, and that it is based on populist contempt for anything un-British. Whatever the case, this article has, hopefully, shown that the proposals are based on misconceptions and an exaggeration of the reach of the Convention, the Act, and of human rights in general. The proposals represent a starting point for (limited) political discussion, but as a template for legal reform, they are legally, constitutionally and diplomatically misinformed and incomplete.

Legal and criminal prosecution of disinformation in Spain in the context of the European Union

Professor Carlos Espaliú-Berdud [*]

Introduction

Disinformation poses a very important and growing risk to our society, either alone or in association with other hybrid threats, addressed at both the international and European Union (EU) as well as national level. Within the EU, a multidisciplinary and cooperative approach has been advocated between all the actors involved, in contrast to the strong regulatory perspective traditionally adopted in the history of European integration within the EU framework. For this reason, together with the inherent limitations imposed by the nature of the right to freedom of expression and information on any possible administrative censorship or criminal punishment, Spain has adopted only one recent regulation (Decree PCM/1030/2020) to establish the Spanish procedure to combat disinformation as required by European directive. Moreover, although fake news cannot be prosecuted directly in Spain outside the scope of crimes against the market and consumers, fake news can include very different types of criminal offence depending on the content and the intention with which it is disseminated. This article will illustrate these possibilities through some recent judicial decisions on this matter together with declarations by the Office of the Attorney-General. It remains to be seen whether this soft approach to combating disinformation will be sufficient to effectively combat this new plague on our contemporary society.

In recent years, cyberattacks on both public and private institutions have multiplied in all countries around the world. In fact, according to data from the National Cryptological Center of the Ministry of Defense, Spain is subject to three critical or highly dangerous cyberattacks against the public sector or strategic companies per day (National Cryptological Center, 2019). The origin and purposes of these attacks are varied, but it is particularly worrying that some of them come from states:

> "Whose purpose is to weaken and compromise Spain's economic, technological, and political capacity in an increasingly complex, competitive, and globalized world".[1]

Alongside these cyberattacks of great relevance to national interests, there are frequent attacks on all types of entities or individuals; of lesser importance to global interests, but clearly still of great importance to the lives of those individuals or entities. Parallel to these cyberattacks focused on disrupting the computer systems of those affected, other attacks are occurring more and more frequently, the aim of which is to disrupt public opinion, thereby damaging the democratic functioning of democratic states as well as international organisations. This type of action has been included under the already well-known term of "disinformation" campaigns. More precisely, this term can be defined as

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[1] National Cryptological Center, 2019, 4.

> "[...] the intentional dissemination of non-rigorous information that seeks to undermine public trust, distort the facts, transmit a certain way of perceiving reality, and exploit vulnerabilities with the aim of destabilization."[2]

In this regard, it should be noted that it is not uncommon to associate disinformation campaigns exclusively with well-known phenomena such as fake news, false news, or hoaxes, although, as seen from the various elements of the proposed definition, various other actions should also be included when talking about "disinformation" campaigns. Among these, without being exhaustive, one can mention the news approach, or the use of technical means to manipulate reality, such as algorithms, automated bot accounts, etc. In his appearance before the Parliamentary Commission on National Security of Spain, the Director of the NATO Center Stratcom Center of Excellence, Mr. Sarts, provided an example. That was that, according to data collected by researchers of the center he directed, 85 per cent of the content in Russian on Twitter in which the words "NATO," "Latvia," or "Estonia" appear was generated by robots.[3]

By way of illustration, let us indicate the methodology that some of these more serious disinformation campaigns utilise with the aim of destabilising the attacked society. First, an identification and analysis of the social and political vulnerabilities of the victim of the attack is carried out. Second, transmedia narratives to be disseminated through various communication channels are developed. Third, a network of individual media outlets is set up. Finally, automated distribution channels are created.[4] In this regard, it should be emphasised that, although such deception techniques have always been used to achieve political or war aims today,[5] owing to the technological revolution that has taken place worldwide, their danger and scope have multiplied, constituting a serious global risk.[6] Furthermore, experts point to various factors that are contributing to the proliferation of such disinformation campaigns. First, it is necessary to highlight their high level of effectiveness, due to the current technological possibilities, normally affecting social vulnerabilities that already exist in the attacked society. Like weeds among the wheat, elements of illegitimate disinformation are inserted into legitimate social and political communication channels, increasing their apparent veracity. Second, their recurrence is explained by the difficulty of attributing responsibility for such campaigns and the obstacles to identifying the link between an orchestrated campaign and its resulting influence on changes in public opinion through the attacked entities. Finally, the extent and dangerousness of such disinformation campaigns make it intrinsically difficult for democratic societies to prosecute these hostile actions against our societies from a legal point of view, unlike other behaviors whose offensive nature is clearer, such as armed attacks, terrorist actions, or even attacks on computer systems or hacking. Indeed, it is difficult to counteract disinformation without simultaneously attacking the fundamental principles of democratic states and societies, such as freedom of expression and opinion, which underpin the fundamental individual rights of both citizens and foreigners.

In this way, we can understand that determining the legal instruments with which states fight disinformation campaigns is not only of interest from a sociological perspective by allowing us to delve into the features and dimensions of this new social phenomenon. Equally, it is

[2] Olmo-y-Romero, 2019, 4.
[3] Cortes Generales, 2017, 15.
[4] National Cryptological Center, 2019, 17-19.
[5] National Cryptological Center, 2019, 5.
[6] Shao et al., 2018, 2.

also of great legal and political interest by revealing the democratic maturity and level of respect for the rule of law prevailing in these states. In this regard, our aim herein is to shed light on the means by which Spain has been equipped to confront this type of campaign and its perpetrators, in particular through the instruments of criminal law. To this end, we first present the context of EU law within which Spanish legislation is framed. We then analyse Spanish legislation adopted to counter these new forms of attack, focused on fundamental values of society and the tools that criminal law provides for this. Finally, we present some conclusions.

We follow the methodology of the legal sciences, analysing primary sources such as international treaties and other legal regulations of the EU and the Council of Europe, as well as the *ad hoc* legal regulations adopted in Spain or the appropriate criminal regulations, together with the jurisprudence of the European and Spanish courts on the subject. At the same time, relying on secondary sources, we highlight the most relevant and recent doctrinal developments in the fight against disinformation in Spain.

Background regarding the fight against disinformation in the EU

Awareness of the problem within the limits inherent to the rule of law

As mentioned in the Introduction, neither states nor international organizations, let alone the EU, are spared from disinformation campaigns. In this sense, it has been increasingly recognized by the Member States, and by the EU itself, that they have suffered massive disinformation campaigns, especially in electoral or political contexts; either from internal groups, as in the recent electoral campaigns in Germany,[7] or from third countries, with the specific objective of discrediting and delegitimising elections.[8] Recently for example, in September 2021, Josep Borrell, the High Representative of the European Union for Foreign Affairs and Security Policy, stated that some Member States had observed malicious computer activities, collectively referred to as Ghostwriter, that endangered integrity and security, and linked them to the Russian state. High Representative Borrell stated that such activities were directed against parliamentarians, government officials, politicians, and members of the EU press and civil society through access to computer systems and personal accounts, and data theft. Borrell concluded that these activities were contrary to the rules of the responsible behavior of states in cyberspace endorsed by all members of the United Nations and aimed at undermining the democratic institutions and processes of the Member States of the EU, "[…] in particular by enabling disinformation and manipulation of information."[9]

Indeed, as pointed out by the High Representative of the Union, disinformation campaigns are particularly compromising at the EU level, by disrupting the free exercise of freedom of information for malicious purposes, which lies very close to the central core of democratic life in the EU and its Member States. In this regard, it should be recalled that the European Court of Human Rights (ECHR) has reiterated in its jurisprudence that "Freedom of expression, […] constitutes one of the essential foundations of a democratic society and one of the primary conditions for its progress."[10]

[7] Delcker; Janosch, 2021.
[8] European Commission, 2018 c.
[9] Council of the European Union, 2021.
[10] ECHR, 1992, *Castells v. España*, para. 42.

Indeed, this reality is inscribed in the fundamental rules of the Union. Thus, Article 2 of the Treaty on European Union (TEU) states that democracy is one of the fundamental values of the EU, and is based on the existence of free and independent media, whose operation requires the full exercise of freedom of expression and information. This freedom is guaranteed, in turn, by Article 11 of the Charter of Fundamental Rights of the European Union. It should be remembered that, according to this provision, freedom of expression and information includes freedom of opinion, freedom to receive or communicate information or ideas without interference by public authorities and regardless of borders, as well as freedom of the media and its pluralism. Article 10 of the European Convention on Human Rights (ECHR), which is also part of EU law, recognizes the right to freedom of expression. According to its provisions: "This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."

However, the provision's text also clarifies that

> "1. […] This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

Meanwhile, European jurisprudence, from both the Court of Justice of the European Union (CJEU) and the ECtHR, has, when interpreting and applying this right, reiterated that any limitation of freedom of expression must be interpreted restrictively and any limitation must be imposed by regulatory provisions.[11] Of particular interest to our work is the fact that the CJEU has warned authorities that they cannot silence opinions, even if they are contrary to the official view.[12] Even for the ECtHR, Article 10 of the ECHR:

> "[…] does not prohibit discussion or dissemination of information received even if it is strongly suspected that this information might not be truthful. To suggest otherwise would deprive persons of the right to express their views and opinions about statements made in the mass media and would thus place an unreasonable restriction on the freedom of expression set forth in Article 10 of the Convention."[13]

Adoption of measures by the EU to combat disinformation

In this context of growing concern about disinformation and the need for the EU to address it, in March 2015, the European Council requested that the High Representative of the European Union for Foreign Affairs and Security Policy prepare an action plan on strategic communication.[14] This led to the establishment of the East StratCom Task Force, operational since September 2015 and part of the Information Analysis and Strategic Communications Division of the European External Action Service. Its main mission is to

[11] CJEU, 2001, *Connolly v European Commission*, para. 42.
[12] *Connolly v. European Commission*, para. 43.
[13] ECHR, 2005, *Salov v. Ukraine*, para. 103.
[14] European Council, 2015, point 13

develop communication elements and information campaigns aimed at better explaining EU policies in the countries of Eastern Europe.

A few months later, in June 2017, the European Parliament began to reflect on the need to adopt legal instruments regarding disinformation and the spread of false content.[15] In this regard, before examining the measures adopted by the EU in recent years focusing on disinformation, we must point out the need to take into account that this phenomenon can only be addressed from a multidisciplinary perspective. This is because it affects a multitude of aspects, such as hybrid threats, the digital single market, the regulation of the media in the EU and its Member States, etc. There is no doubt, therefore, that the regulation of the disinformation phenomenon is based on a broad and complex EU regulatory framework, generally from before the explosion of this phenomenon in recent years.[16] Thus, among many other community regulations involved in a more or less indirect way, one can cite the following:

- Directive 2013/40/EU, aimed at the harmonisation of the criminal law rules of the Member States in the field of attacks against information systems by establishing minimum rules relating to the definition of criminal offences and applicable sanctions, and improving cooperation between the responsible authorities, including the police and other specialized services;
- EU Directive 2016/1148, regarding measures to ensure a high common level of network and information system security in the EU;
- The package of measures adopted by the European Commission in 2018 to ensure free and fair European elections (European Commission, 2018c);
- Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018, which amended Directive 2010/13/EU regarding the coordination of certain provisions laid down by law, regulation, or administrative action in Member States concerning the provision of audiovisual media services (the Audiovisual Media Services Directive), in the light of changing market realities.

Returning to the study of measures taken specifically to tackle disinformation, it is worth highlighting that, in January 2018, the European Commission established a high-level group of experts to advise on political initiatives aimed at countering fake news and disinformation disseminated online, which was of great importance for the evolution of EU action in this field. Its final report, published on March 12, 2018, reviews best practices in the light of fundamental principles and appropriate responses derived from those principles, proposing to the European Commission a multidimensional approach to this issue,[17] and seeking to involve all relevant parties in any future action and insisting on the need for self-regulation. The report also recommended a number of other measures, such as promoting media literacy among the population, developing tools to empower users and journalists to tackle the phenomenon of disinformation, or protecting the diversity and sustainability of European media. As measures aimed in particular at private actors, the report of the expert group advocated the development of a code of principles that online platforms and social networks should endorse, including, for example, the need to ensure transparency when explaining how their algorithms select the news that is presented. With regard to monitoring the implementation of the proposed measures, the report suggested the establishment of a multilateral coalition of relevant parties to ensure that any agreed measures are

[15] European Parliament, 2017.
[16] Seijas, 2020, 3.
[17] Renda, 2018, 21.

implemented, monitored, and regularly reviewed.[18] It is interesting to note the complete absence of any recommendation to the community bodies regarding the adoption of mandatory legal standards for the Member States.[19]

In response to these suggestions, in March 2018, the European Commission and the High Representative of the European Union for Foreign Affairs and Security Policy developed the Action Plan against Disinformation, which was approved by the European Council in December 2018.[20] This action plan builds on the recognition of the need for political determination and unified action between EU institutions, Member States, civil society, and the private sector, especially online platforms. This unified action should be based on four pillars: i) improving the capacities of EU institutions to detect, analyze, and expose disinformation; ii) strengthening coordinated and joint responses to disinformation; iii) mobilising the private sector to tackle disinformation, and iv) raising awareness and enhancing societal resilience.

In this sense, it should be noted that, as stated by Fonseca-Morillo in the conception of the plan: "[...] media literacy goes beyond the knowledge of information technologies: it is about developing the critical thinking skills necessary to analyze complex realities and distinguish facts from opinions or create content responsibly."[21]

In the action plan, and with regard to the necessary legislative development, the Commission and the High Representative requested that Member States implement the provisions contained in Article 33a of Directive (EU) 2018/1808 on audiovisual media services as soon as possible. This requires Member States to promote and take measures for the development of media literacy skills and to report regularly to the European Commission on the introduction and implementation of such measures.

As a result of the implementation of the 2018 action plan, the EU's Rapid Alert System was launched, set up between EU institutions and Member States to facilitate the exchange of information on, and coordinate responses to, disinformation campaigns. The Rapid Alert System is based on open-source information and draws on the expertise of academia, fact checkers, online platforms, and international partners.

Along the same lines, in April 2018, to involve private actors (especially online platforms) in the fight against disinformation, the European Commission proposed a code of practice that implies self-regulatory rules that must be voluntarily accepted by private operators to achieve the objectives set by the European Commission.[22] These self-regulatory rules set out a wide range of commitments, from transparency in political publicity to the closure of false accounts and the demonetisation of disinformation providers. The code of practice was subsequently opened for signature by the main operators in this field, many of which - Facebook, Google, Microsoft, Mozilla, TikTok, and Twitter - had already signed by the mid-2020s.[23]

[18] European Commission, 2018, a.
[19] Jiménez-Cruz et al., 2018.
[20] European Commission and High Representative of the European Union for Foreign Affairs and Security Policy, 2018.
[21] Fonseca Morillo, 2020, 2.
[22] European Commission, 2018 b.
[23] European Commission, 2021.

On the other hand, we must remember that the severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) pandemic, more popularly known as coronavirus disease 2019 (Covid-19), has been accompanied by powerful disinformation campaigns, further overshadowing the aforementioned panorama, eventually leading the World Health Organization to label the situation as an "infodemic." [24]For example, in a joint communication in June 2020, the European Commission and the High Representative of the EU warned of the multiple harmful elements of the pandemic. This included that some foreign actors and certain third countries, in particular Russia and China, had undertaken disinformation campaigns concerning Covid-19 in the EU, its surroundings, and on a global scale to undermine the democratic debate and exacerbate social polarisation.[25] In that press release, the Commission and the High Representative recommended continuing to act through the instruments available to the EU, building on the December 2018 Action Plan against Disinformation and in collaboration with the competent authorities of the Member States, civil society, and social media platforms, with the aim of increasing the resilience of citizens.

At the same time, the Commission and the High Representative stressed the need for this fight against disinformation to be carried out without undermining freedom of expression and other fundamental rights, as well as democratic values. It should be noted that the Commission and the High Representative warned that the Covid-19 crisis had exposed the risk that some measures designed to tackle the "infodemic" would be used as a pretext to undermine fundamental rights and freedoms, or would be abused for political purposes inside and outside the EU. The press release went so far as to point out some deviations from the delicate balance between freedom of expression and the criminal repression of disinformation by Member States. For example, the introduction of a new specific offence of dissemination of disinformation into the Hungarian penal code was seen during the state of alert.[26]

Finally, in December 2020, an Action Plan for European Democracy was adopted, emphasizing the well-known approaches to disinformation and reaffirming that to preserve and strengthen its democratic life, the EU needs to make more systematic use of the full range of tools it possesses to counter foreign interference and influence operations. There is also an emphasis on the need to further develop these tools, in particular by imposing sanctions on those responsible.[27] In relation to the cooperation of online platforms and the usefulness of the Code of Practice on Disinformation, the Commission recognized that there was a need for: "[…] a stronger approach, based on clear commitments and subject to appropriate monitoring mechanisms, to combat disinformation more effectively." [28] In this regard, the European Commission announced that the future Digital Services Act will propose: "[...] rules to ensure that platforms have greater responsibility when it comes to reporting on how they moderate their content, advertising, and algorithmic processes."[29]

We have referred to the array of measures that the EU has taken in recent years against disinformation, although it is striking that there are no legal acts, such as directives or

[24] World Health Organization, 2019, 34.
[25] European Commission and High Representative of the European Union for Foreign Affairs and Security Policy, 2020, 4.
[26] European Commission and High Representative of the European Union for Foreign Affairs and Security Policy, 2020, 12-13.
[27] European Commission, 2020 b, 24.
[28] European Commission, 2020 b, 26.
[29] European Commission, 2020 b, 26.

regulations, from the Member States that are focused on this problem. Undoubtedly, this lack of adoption of hard law norms is due to the sensitivity of this topic, as it is strongly related to freedom of expression and information. This absence was recommended, for example, by the 2018 report from the high-level expert group on disinformation. However, note that, if such disinformation campaigns were part of a hybrid threat from abroad, the primary responsibility for legislating on this matter would rest with the Member States of the EU, since it should not be forgotten that the fight against disinformation campaigns is, to a large extent, a question to be addressed by individual nations. This was highlighted by the European Commission and the High Representative of the Union for Foreign Affairs and Security Policy in their 2017 Joint Report to the European Parliament, and the European Council on the implementation of the Joint Communication on Countering Hybrid Threats of April 2016. In the words of those senior European authorities, while the EU can help Member States strengthen their resilience to hybrid threats: "[…] the primary responsibility lies with the Member States, as the fight against hybrid threats is a matter of defense and national security."[30]

For these various reasons, there are no solid EU rules on this subject, and this lack of legal reach, with its consequent negative impact on effectiveness, has already been highlighted by the European Commission's first evaluation report on the implementation and effectiveness of the Code of Practice on Disinformation in 2020.[31] It has also been strongly criticised by some authors, such as Pamment, for whom the EU's policy on disinformation is characterized:

> "[...] by a lack of terminological clarity, unclear and untested legal foundations, a weak evidence base, an unreliable political mandate, and a variety of instruments that have developed in an organic rather than a systematic manner. The limited successes the EU has achieved so far –in terms of the creation of instruments such as the Code of practice on Disinformation, the Action Plan Against Disinformation, the East StratCom Task Force, and the Rapid Alert System– have been hard earned".[32]

The legal and criminal context of the fight against disinformation in Spain

Adopting a multidisciplinary lens to link disinformation to cybersecurity instead of adopting specific regulations against it

Spain was established as a democratic society in 1978 and is a member of European international organizations, such as the Council of Europe and the EU, which require respect for the rule of law in order to join them. Spain is thus not oblivious to the legal requirements linked to the impossibility of limiting fundamental rights, such as freedom of expression and information. Therefore, the Spanish Constitutional Court (CC) has made declarations similar to the European high courts. These have pointed out, for example, that the rights guaranteed by article 20.1 of the Constitution (freedom of expression and information; right to literary, artistic, scientific, and technical production and creation; and freedom to teach**):** "[...] are not only an expression of a basic individual freedom but are also configured as elements shaping our democratic political system".[33]

[30] European Commission and High Representative of the European Union for Foreign Affairs and Security Policy (2017), 2.
[31] European Commission, 2020 a.
[32] Pamment, 2020, 5.
[33] *Constitutional Court*, 2007, Judgment 235/2007, Legal basis, 4.

On the other hand, when freedom of information has come into conflict with other fundamental rights, such as the right to dignity or to one's own image, the Constitutional Court has highlighted the prevalent or preferential nature of freedom of information regarding its reporting capacity of a free public opinion, an essential element of political pluralism in democratic states.[34]

The limitations imposed by the nature of the rights that accompany freedom of expression in the media and on social networks, and the recommendations from the legal instruments and reports from community sources described above, are based on a self-regulatory approach encompassing all the actors involved without giving exclusive prominence to the community or national authorities. They highlight the fact that there is no criminal law that directly combats disinformation in Spain, and that this problem is being addressed from a multidisciplinary perspective by linking disinformation to cybersecurity.

In this vein, a national strategy was developed in 2013, and renewed in 2019 and 2021, integrating cybersecurity into the national security system. This strategy is committed to strengthening a strong but perhaps overly complex institutional structure (including the National Security Council, National Cybersecurity Council, Situation Committee, Standing Committee on Cybersecurity, and National Cybersecurity Forum), including public–private cooperation, integration into international initiatives, and the development of a culture of cybersecurity. In particular, it promotes a critical spirit for the benefit of truthful and high-quality information that contributes to the identification of fake news and misinformation. Thus, it is obvious that, in the context of cybersecurity, regarding the protection of information systems, more specific legal instruments have been adopted in Spain than those intended to protect against disinformation. Among these is Royal decree 12/2018, from September 7, concerning the security of networks and information systems, which transfers the Directive (EU) 2016/1148 into Spanish law, on measures aimed at ensuring a high common level of security of networks and information systems in the EU. In this regard, it is important to highlight the opinion of the Operating Director of the Department of National Security, for whom all these approaches and measures are proving useful, and note that Spain is in a prominent position, at both a European and global level, in relation to the protection of cybersecurity.[35]

On the other hand, it should be noted that on November 30, 2021 the Government of Spain approved the draft of the General Law on Audiovisual Communication that transfers the audiovisual media services directive reformed in 2018 into the Spanish legal system. The Bill is currently reaching the end of its parliamentary process, and the Bill, which falls into the area of protection against disinformation, emphasises the desirability of adopting voluntary codes of conduct developed by audiovisual media service providers, industry, business, or professional or user associations and organizations (Article 34). Likewise, in line with regulations adopted in the EU and Spain, it insists, on the implementation of measures aimed at the acquisition and development of media literacy skills in all sectors of society (Article 10).[36]

To end this section and to illustrate the launch of campaigns in Spain in the field of digital literacy, involving private actors and civil society, we provide the views of Gallardo-Camacho and Marta-Lazo as an example. They point to the initiative of the Atresmedia group, which has opted to implement mechanisms to guarantee the credibility of the news

[34] Congreso de los Diputados, Spanish Constitution, synopsis of article 20.
[35] Cortes Generales, 2019a, 12.
[36] Congreso de los Diputados, 2021.

and press services of its two major networks, Antena 3 Noticias and la Sexta Noticias, as well as the opening of online sites to help citizens check the veracity of the content in the press.[37]

Options for indirect criminal prosecution of conduct involving disinformation in Spain

As noted above, in Spain, the dissemination of false information or fake news, either alone or as possible elements of disinformation campaigns, does not constitute criminal conduct according to the Criminal Code. Although this issue has been the subject of strong debate in recent months, considering the amount of fake news generated regarding the pandemic, criminalising these acts in and of themselves would go against the fundamental right of freedom of expression established in article 20 of the Spanish Constitution of 1978. We reproduce this below, almost in its entirely, because of its centrality in terms of disinformation:

> "Article 20. 1. The following rights are recognized and protected: a) to freely express and disseminate thoughts, ideas, and opinions through speech, writing, or any other means of reproduction; b) Literary, artistic, scientific, and technical production and creation. [...] d) Free communication or receipt of accurate information by any means of dissemination. […]. 2. The exercise of these rights cannot be restricted by any type of prior censorship. […] 4. These freedoms have their limits in respect to the rights recognized in this section, in the precepts of the laws that implement it, and especially, in the right to dignity, privacy, self-image, and protection of adolescence and childhood. 5. The seizure of publications, recordings, and other means of information may be agreed upon only by court order."

Thus, in the Spanish legal system, with a few exceptions, disinformation campaigns can only be prosecuted indirectly, on the basis of the consequences of the actions of such campaigns on other, protected legal assets, notwithstanding whether such information or statements have been spread via traditional or online channels. In this latter regard, we point out incidentally that, as Professor Pere Simón warned, the criminal response to opinions spread in the online context does not require the invention of specific responses for this medium by the legislator, but rather the application of the principles operating in the analogue world, adapted where necessary.[38] However, some authors have noticed differences in the judicial treatment of disinformation depending on the channel where it appears. Thus, as Professor Cabellos Espiérrez has shown, the great capacity for content dissemination that is intrinsic to the internet and social networks entails that, in jurisprudential practice in Spain, the criminal treatment of content appearing in such channels: "[...] is done in a way that tends to restrict the effectiveness of freedom of expression [...]".[39]

One of these specific exceptions in which the use of fake news is directly pursued can be understood in a broad sense as evidenced by a report from the Technical Secretariat of the *Office of the Attorney-General* entitled "Criminal treatment of fake news",[40] which is

[37] Gallardo-Camacho; Marta-Lazo, 2020, 5.
[38] Simón-Castellano, 2021, 189.
[39] Cabellos Espiérrez, 2018, p. 47.
[40] *Office of the Attorney-General*, 2020, 1.

constituted by false information in the field of crimes against the market and consumers. Indeed, article 282 of the Criminal *Code* punishes:

> "[...] manufacturers or traders who, in their offers or advertising of products or services, make false allegations or manifest uncertain characteristics about them, so that they can cause serious and manifest harm to consumers, without prejudice to the penalty that must be applied for the commission of other crimes".

Likewise, article 284.1.2 of the Criminal Code punishes with imprisonment or a fine those who, by any means, for profit, disseminate false or misleading news or rumors about persons or companies, on the basis of false data.

As mentioned above, apart from these cases, which would not even fall properly within the framework of disinformation described in the beginning, fake news, which is more related to political motivations, can include very different crimes depending on the content and the intention with which it is disseminated. In this work, the presentation of the possible crimes follows the classification proposed in the cited "Criminal treatment of fake news" report from the Technical Secretariat of the Office of the Attorney-General.

Thus, fake news can constitute hate crimes under article 510 of the Criminal Code, which punishes

> "[...] the expression of epithets, qualifiers, or expressions that contain a message of hatred that is transmitted in a generic way [...]" (*Supreme Court*, 2018, Fundamento de Derecho Único), and is likely to generate a climate of hatred, discrimination, hostility, or violence against certain groups. In this regard, paragraph 3 of that article of the *Criminal Code* provides that:
>
> "The penalties provided for in the preceding paragraphs will be imposed in the upper half of the range when the acts have been carried out through a social communication medium, through the internet, or through the use of information technologies, so that it becomes accessible to a large number of people."

Recently, in fact, the Supreme Court sentenced a person on appeal for a hate crime for issuing expressions inciting hate against a collective on the social network Twitter in 2015 and 2016, specifically applying the aggravating circumstance of article 510.3 of the Criminal Code, since the author had two accounts on that social network that had around 2,000 followers.[41]

In the case where the use of fake news or other possible forms of disinformation is accompanied by the disclosure of real personal data, the Office of the Attorney-General considers that such conduct may constitute a crime of discovery and disclosure of secrets described in article 197 of the Criminal Code.[42] Note that the drafting of this article of the Criminal Code is the result of the transfer into Spanish law of Directive 2013/40/EU on attacks against information systems, which seeks to harmonize the criminal laws of the Member States to curb the:

> "[...] threat posed to the EU by the risk of computer attacks of a terrorist or political nature against the computer systems of the Member States' critical infrastructures or

[41] Supreme Court, 2018, Fundamento de Derecho Único.
[42] Office of the Attorney-General, 2020, 2.

> of those of the institutions of the EU, and also to the growing trend toward large-scale attacks based on new methods of action, such as the creation and use of infected networks of computers (botnets)." [43]

Likewise, in the case of fake news that may significantly affect an individual, the crime against moral integrity in article 173.1 of the Criminal Code could apply.[44] In this regard, we must point out how in the appeal against one of the trials arising from the actions carried out by the notorious "mandala" in Spain, the defendant's argument that he had created a website under the name "tourlaManada.com" to denounce the frequent disinformation campaigns that appear in the media was not admitted as a reason for acquittal from the commission of the crime against moral integrity in article 173 of the Criminal Code. In fact, for the defendant, the website had not been created to offer a guided tour of the places that the five members of the group visited before the acts constituting the crime of sexual abuse: "[...] but a vindictive act to draw attention to the disinformation of the media and its tendency to collect harsh news without verifying sources."[45]

Disinformation campaigns or the use of fake news may also include some element of terrorist offences. Thus, on occasion, the perpetrator of a disinformation campaign has been convicted of a terrorist recruitment and indoctrination offence. This was the case, for example, of a self-styled Islamic State militant residing in Melilla who resorted to a disinformation campaign by introducing fake news on Facebook about the conquest of Mosul by the Dash. He was ultimately sentenced in the National Court in 2021 for the crime of recruitment and terrorist indoctrination, provided for and punished in article 577.1 and 2 of the Criminal Code.[46]

Fake news or disinformation campaigns can also be considered to represent acts that violate the right to dignity. Thus, for example, the recent publication on social networks of certain videos concerning a person of public relevance, edited in a biased way, was considered by a judge as a distortion of the original publication's true content as a whole, thus representing a manipulation of public opinion and, therefore, a qualified action of disinformation and intentional manipulation. It should be added that this was one of the elements that led to the conviction of the defendant in the case for violation of the plaintiff's right to dignity.[47] Likewise, the Office of the Attorney-General believes that fake news can extend to the crimes of slander, from articles 205-206 of the Criminal Code, or of defamation, from articles 20–209 of the Criminal Code.[48]

Similarly, fake news regarding possible curative methods without medical confirmation or such that are clearly ineffective could constitute one of the crimes against public health provided for in articles 359 *et seq*. of the Criminal Code. However, if these acts additionally imply an intention to do business, they would represent a crime of fraud from articles 248 *et seq*. of the Criminal Code.[49]

Recent attempts to combat disinformation more directly

[43] *Office of the Attorney-General*, 2017, 2.
[44] *Office of the Attorney-General*, 2020, 2.
[45] *Provincial Court of Navarre*, 2020, pp. 4-5.
[46] Audience Nacional, 2021, 6.
[47] Provincial Court of Granada, 2020, Fundamentos de Derecho Primero.
[48] Office of the Attorney-General, 2020, 2–3.
[49] Office of the Attorney-General, 2020, 3.

After this succinct review of the current state of affairs regarding the possible criminal prosecution of disinformation indirectly, via the damage it can do to various legal assets, we must now address the various recent attempts to regulate this issue directly, given the pressing nature of this problem in our society in recent years. In this regard, it should be borne in mind that countries in close proximity to Spain have shown the same concern, particularly in electoral matters. For example, Germany enacted a specific law in June 2017 against posting hate speech, child pornography, terrorism-related articles, and false information on social media, given the inadequacy of voluntary measures taken by social media platforms.[50] Likewise, in November 2018, France adopted a law against the manipulation of information, with the objective of better protecting democracy against various forms of intentional dissemination of false news.[51]

In Spain, it must be noted that, in December 2017, the Partido Popular parliamentary group presented a proposal in the Congress of Deputies aimed at directly regulating fake news.[52] However, this proposal was rejected in March 2018 and was not acted upon.[53] In addition, in those months, some groups also opposed the regulation of fake news because they understood that such regulation could go against the fundamental right to freedom of expression and was unnecessary because there was already regulation of fake news and propaganda in the Electoral Law as well as the Criminal Code.[54]

Later, in October 2020, and in the midst of the pandemic, the coalition government formed by the Spanish Socialist Workers' Party and Unidas Podemos adopted a law to combat disinformation. According to its own text, the purpose of the law is no other than to respond to the requirements of the EU and: "[...] implement at the national level the policies and strategies promulgated in the field of the fight against disinformation [...]"

Further, it should: define the bodies, agencies, and authorities that make up the system, as well as define the procedure of their actions.[55] Specifically, within the National Security System, an institutional framework was established for the fight against disinformation, consisting of: (1) the National Security Council; (2) the Situation Committee; (3) the Secretary of State for Communication; (4) the Permanent Committee against Disinformation; (5) responsible public authorities; and (6) the private sector and civil society. As part of the planned procedure, the law established a series of action or activation levels from the National Security System aimed at combating disinformation in view of the danger level of the threat. It should be highlighted that a level 4 is envisaged, which will involve coordination: "[...] of the response at the political level by the National Security Council in case of public attribution of a disinformation campaign to a third State".[56]

In this regard, it is worth highlighting how the doctrine usually warns of the risks and dangers of leaving controlling and limiting powers in matters related to freedom of expression to the administrative authorities, while advancing the desirability of attributing these powers to the judiciary.[57] In fact, the aforementioned 2020 law to combat disinformation was subject to an appeal before the Supreme Court by various institutions and on various grounds. In particular, this was because its implementation would imply a

[50] Bundesrepublik Deutschland, 2017.
[51] République Française, 2018.
[52] Congreso de los Diputados, 2018.
[53] Congreso de los Diputados, 2018.
[54] Cortes Generales, 2019 b.
[55] Government of Spain, 2020, Law PCM/1030/2020.
[56] Government of Spain, 2020, Law PCM/1030/2020.
[57] Cabellos-Espiérrez, 2018, 48.

form of prior censorship, likely to jeopardize the right to freedom of expression and the right to information, without the due guarantees required by the Spanish Constitution for the limitation of fundamental rights, or for not respecting the organic structure provided for in Law 36/2015 on National Security. The Supreme Court has issued decisions on incidental or procedural legitimacy matters regarding the plaintiffs,[58] but in a recent judgment, from October 18, 2021, it entered the main substance of the matter. In it, the Supreme Court rejected the basis of the contentious administrative appeal filed by Confilegal. This, in essence, attacked the provisions of Law PCM/1030/2020 as it gave prominence regarding actions to be taken against disinformation to the Department of National Security, whose action lies beyond judicial control, thus depriving the National Intelligence Center of its primary role and: "[...] which is deprived of the functions attributed by article 4 of Law 11/2002, functions that it performs – and here would be the core of its challenge – under judicial control [...]."[59]

However, for the Supreme Court, the contested law fully respected the organic and jurisdictional structure provided for in Law 36/2015 regarding National Security and, therefore, it declared the law to be in accordance with the legal structure.[60]

A question regarding Law PCM/1030/2020 was also addressed to the Commission in the European Parliament in November 2020. In particular, the Commission was first asked whether it had analyzed the fact that the monitoring committee proposed in the law under examination:

> "[…] is controlled by the Secretary of State for Communication, which reports directly to the Ministry of the Presidency, and that the order speaks of examining 'the freedom and pluralism of the media'?"

Additionally, the Commission was asked whether it considered:

> "[…] that the content of the government decision is irrelevant and that it is sufficient to use the pretext of the fight against disinformation to accept any measure." [61]

Then, on February 25, 2021, Vice President Jourová, on behalf of the Commission, responded in writing noting that the Ministerial Order in question

> "[...] updates the existing Spanish system to prevent, detect, and respond to disinformation campaigns and to establish coordination structures" [...], and "[...] it does not constitute a legal basis for deciding on the content of information provided by the media".

In addition, in the Commission's view:

> "[...] the Permanent Committee is responsible for monitoring and evaluating online disinformation campaigns, investigating their origin, and determining whether the case should be referred to the National Security Council for a political response, such as diplomatic action or retaliatory measures when the perpetrator is a foreign state. This work is the responsibility of the central government and is in line with the 2018 Action

[58] Supreme Court, 2021a; b; c; d,
[59] Supreme Court, 2021, and Fundamento de Derecho Sexto.
[60] Supreme Court, 2021e, Ruling.
[61] European Parliament, 2020).

Plan against Disinformation, which called on Member States to strengthen their capacities in the fight against disinformation."[62]

Conclusions

This article has analysed the different legal ways to prosecute disinformation in Spain that were already provided for by criminal law, and the attempts made in recent years (when the phenomenon reached very worrying dimensions) to legislate and control it through other channels.

We have contextualized this legal study in the fight against disinformation within the EU to determine, where appropriate, the possible origin, context, and motivation of Spanish regulations. This research thereby highlights the important limit that every democratic entity encounters concerning the right to freedom of expression and information when fighting disinformation. We must emphasise that this freedom has been recognised as fundamental and inherent to the rule of law in the legal regulation and Spanish communities, by the most relevant European and national instruments in the field. These include the TEU, the Charter of Fundamental Rights of the European Union, the ECHR, or the Spanish Constitution, as well as by the consolidated jurisprudence of European and national courts. Thus, freedom of expression allows criticism of community or national authorities, whether spread through traditional media or new social networks, even if not true. Any limitation to this, which must be based on assessed national security or other legitimate grounds, must be imposed by law, as well as subject to the relevant parliamentary and judicial guarantees. Any type of administrative censorship of content outside these parameters is alien to European values and foreign to the Spanish legal system.

For these reasons, we find that, at the EU level, disinformation has been fought with a series of non-normative measures that advocate a multidisciplinary and cooperative approach among all the actors involved - from EU authorities to online platforms through the Member States. As a corollary, that same approach has provided the framework that has been followed in Spain. Thus, there is only one recent regulation to fight disinformation in a direct and specific way, Law PCM/1030/2020, which rather than regulating content, tries to respond to the European Directive requiring the implementation of procedures and organic structures in each Member State to fight disinformation. Although the law in question has been appealed through the courts, mainly on the basis of the fear of the absence of judicial guarantees in the procedure, all judicial decisions have so far declared it to be in accordance with law, as has the European Commission when questioned in the European Parliament on the matter.

In this way, although the debate on the adequacy of fighting disinformation through solid legal regulations or hard law remains open,[63] it seems that the field is moving to support cooperation between international and national authorities, self-regulation by private actors, such as online platforms, or by launching educational campaigns among the population to increase their resilience to the problem. In this vein, we have described the specific case of digital literacy promotion by an important audiovisual group in Spain to try to guarantee the veracity of the content offered in its newscasts, and to teach users to identify hoaxes in social networks.

[62] European Parliament, 2021.
[63] Magallón-Rosa, 2019, 345.

It remains to be seen whether this soft approach, or recourse to soft law measures to combat disinformation, will be sufficient to defeat this new plague on our contemporary society. It would be highly desirable if the Russian invasion of Ukraine and the fake news accompanying this war could serve as a definitive wake-up call to raise awareness of the importance of these issues.

HUMAN RIGHTS

The application of human rights in the economy

Laura Al Wazzo* and Julia Bonkewitz**

Introduction and background

Due to globalisation, international and cross-border trade transactions and their supply chains have become commonplace. Until recently, business enterprises were not subject to any mandatory requirements to respect human rights within their business activities. This approach has changed over time and attempts have been made to oblige companies to take more care of human rights through binding legal remedies. This article deals with the implementation of the human rights system in business practice and considers its advantages within different legal levels. In the first part, the main components of international human rights sources are discussed in general terms, with particular emphasis on their legally binding effect. Subsequently, it examines to what extent states, apart from the regulations of international law, strive for comparable regulations. Special attention will be paid to the implementation of human rights through targeted regulations and further implementation of European Union law, which is finally supplemented by the inclusion of a national perspective. On the national level, the German legal system is used as paradigm to further illustrate the different levels of regulation. Due to the increased mainstreaming of human rights issues in relation to business within international law, both the European Union and Germany have adopted appropriate legal remedies to regulate future dealings and a comparison of the legal sources should show the consequences for future entrepreneurial duties.

Human rights have been increasingly in the spotlight, but especially their violation by business enterprises within the supply chain. In principle, the system of human rights has been known for centuries. First, fundamentals of these rights are already known from 1750 BC. These fundamental rights differ from our today's understanding, as it was in the past common that human rights only applied to a particular group of society or country.[1] This understanding of the basic definition has changed constantly over time, and it is likely that it will continue to adapt to contemporary events. The definition of the 21st century can be further subdivided based on its background. On the one hand, there are human rights regarding philosophy, where the ideas on human dignity and the rights that belong to everyone everywhere are the focus. On the other hand, there are human rights in the law, with norms and sanctions that over the centuries have been laid down in (international) law, treaties, and declarations. Lastly, there are human rights out of politics and campaigning that arise in the cause of denouncing abuses of countries or governments, to call for solidarity and action for the victims through its external effects.[2]

The proximity to the political process of law-making is often more of a problem than a basis for legitimacy. International law has its own systemic and peace-promoting logic, which

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[1] Amnesty International 'A brief history of human rights' <https://www.amnesty.nl/a-brief-history-of-human-rights> accessed 15th April 2022.

[2] Ibid.; Cf. Wegener 'Menschenrecht auf Klimaschutz? – Grenzen grundrechtsgeschützter Klimaklagen gegen Staat und Private' Neue juristische Wochenschrift 7 (2022), 428.

derives e.g., from its immanent coherence, from the equal treatment of all subjects of international law by the law and, not least, from its fundamental material goals, such as peacekeeping and human rights protection.[3] Due to the strong integration of human rights into political practice, and the juridical binding to states, the meaning of these rights and what they protect becomes to a certain extent relative, to both political interests and the purpose of regulating the interaction of states in the international political sphere. As a result, the individual whose interests are to be protected recedes to some extent into the background - the control of the behaviour of states in the international sphere is seen as the primary purpose of human rights. Moral human rights concepts place the individual, and its fundamental moral claims, at the centre of the idea of human rights.[4]

Over the past decades, it has attempted to define the responsibilities of businesses in the area of human rights protection, which were principally based on the concept of "Corporate Social Responsibility (CSR)" and voluntary approaches. Nevertheless, although the primary duty to protect human rights lies with states, and although there were no legally binding instruments on business accountability for human rights abuses, it is now widely recognised that businesses hold responsibilities in this area.[5] The main problem was, and is, the separation of compulsory and voluntary action, which states are supposed to counteract by creating legally binding instruments.[6] Internationalisation and the growth of international supply chains have brought some advantages, especially to developing countries. With the increasing international interdependencies, some disadvantages have also arisen, such as violation of human rights, in areas such as child and forced labour, but also environmental damage through land theft and pollution. Multinational companies in particular play a major role here, as they can have a considerable influence on local conditions. As the UN Secretary-General, António Guterres, said in his inauguration speech "In the end, it comes down to values [...] we want the world our children inherit to be defined by the values enshrined in the UN Charter: peace, justice, respect, human rights, tolerance, and solidarity".[7] In this context, the UN Secretary-General indirectly refers to the purposes and principles enshrined in Art. 1.3 of the preamble, as well as chapter IV of the UN Charter, which includes direct reference to the protection of human rights and particularly emphasises the relevance of the topic.

In this article, the authors focus on the legal significance of human rights and their impact on international operating companies, especially their supply chains. The general economic activities of the industrialised countries can be accused of tacitly, if not approvingly, accepting the neglect of human rights in international trade if it benefits individual profit

[3] Isabelle Ley, Opposition im Völkerrecht (2015), 118; Jost Delbrück, New Trends in International Law-making – International 'Legislation' in the Public Interest (1997); Jutta Brunnée, '"Common Interest" – Echoes from an Empty Shell?', Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 49 (1989), 791.
[4] Julia Brune, Menschenrechte und transnationale Unternehmen - Grenzen und Potentiale des UN-Framework for Business and Human Rights (2020), 158.
[5] Council of Europe CM/Rec (2016)3 of 25th March 2016 Recommendation Committee of ministers to member states Human rights and business.
[6] John Ruggie 'Just Business – Multinational Corporations and Human Rights' (25th March 2013) <https://edisciplinas.usp.br/pluginfile.php/4424946/mod_resource/content/1/Ruggie%20-%20Just%20Business.pdf> accessed 21st January 2022, 120.
[7] UN Secretary General 'Secretary-General-designate António Guterres' remarks to the General Assembly on taking the oath of office' (12th December 2016) <https://www.un.org/sg/en/content/sg/speeches/2016-12-12/secretary-general-designate-ant%C3%B3nio-guterres-oath-office-speech> accessed 5th May 2022.

and national welfare.[8] For this reason, this article first highlights the most recent sources of human rights from international law, and which legal obligations arise specifically for enterprises. Subsequently, it will examine to what extent states, apart from the regulations of international law, strive for comparable regulations and how these relate to the international rules of human rights. Therefore, the legislation within the European Union will serve as an example, which is completed by the inclusion of a national perspective. On the national level, the German legal system is used as a paradigm to further illustrate the different levels of regulation. The focus of the analysis is further on the individual ways of implementation to guarantee human rights within companies and their supply chains, as well as assessing the binding effect for companies within the framework of the further implementation plans.

The main legal sources under international law

As far back as the history of human rights goes, some sources of law stand out today that have achieved a special significance for its observance. The focus here is on the United Nations (UN), which encourage their member states to implement regulations at national level. Meanwhile 193 of the 195 countries worldwide are UN recognized full statehood states under international law. Currently only Palestine and the Holy See (Vatican City) are not member states.[9] Thus, in the past century, the UN has been the central organisation responsible for human rights in the international sphere and its embedding within international law through appropriate means. At the same time, the relative success of these international human rights efforts is inconceivable without the commitment of numerous non-governmental organisations, which for many decades have been drawing attention to grievances and making strong demands on the international community, politics, business, and civil society to help human rights to achieve a more binding validity.[10] Historically, the most important sources of human rights law belong to the Universal Declaration of Human Rights,[11] the ILO Declaration on Fundamental Principles and Rights at work,[12] such as the Sustainable Development Goals.[13]

UN Guiding Principles on Business and Human Rights

The sources presented thus far together constitute what the UN Guiding Principles on Business and Human Rights describe as internationally recognized human rights. Nevertheless, these do not contain any direct legally binding obligation to force international operating companies to act in a human rights-friendly manner. The point of contention to direct responsibility for enterprises out of international law was the separation of compulsory and voluntary action, which the states are intended to counteract by creating legally binding instruments.[14] Finally, in 2011, the next step was taken. On 16th June 2011, the UN adopted the Guiding Principles on Business and Human Rights (UNGP).[15] This was preceded in 2003 by the "Draft Norms on the Responsibilities of Transnational Corporations

[8] Sonja Opper/Joachim Starbatty 'Menschenrechte und die Globalisierung der Wirtschaft – Konflikt oder Chance' (Uni Tübingen, 1999) <http://hdl.handle.net/10900/47453> accessed 7th April 2022.
[9] Klaus Weber ,'Rechtwörterbuch' (27th Ed 2021) 1468.
[10] Brune (n 4) 12.
[11] UNGA RES 217 (10th December 1948) UN DOC A/RES/217.
[12] International Labour Conference (86th Session) Declaration on Fundamental Principles and Rights at Work and its Follow-UP (Geneva 18th June 1998).
[13] UNGA RES 70/1 (25th September 2015) UN DOC A/RES/70/1.
[14] Ruggie (n 6) 130.
[15] UNCHR 2011 'Guiding Principles on Business and Human Right: Implementing the United Nations "Protect, Respect and Remedy Framework' (16th June 2011) UN Doc [ST/] HR/PUB/11/4.

and Other Business Enterprises with Regard to Human Rights",[16] which were rejected. The norms were developed to constitute a 'non-voluntary', comprehensive framework base creating direct obligations for transnational companies, which were accompanied by often fierce opposition from various states and most of the business community.[17]

The enacted version of the UNGP is based on existing human rights obligations, within 31 principles, basic obligations and responsibilities in the context of business-related human rights. In turn, these can be divided into three pillars. The first one is to identify the legal obligations of states for human rights; the second includes the independent CSR to the human rights, and the last pillar is a redress mechanism associated with the other pillars.

Overall, the article sets out obligations for states and recommendations for actions of companies. However, it does not contain established boundaries on how to act when users violate these principles.[18] The UNGP requires states to provide for liability of legal persons independently of that of natural persons and not to add civil liability to criminal liability. This means that to establish civil liability, it is not necessary to first establish criminal liability.[19] Professor Dr Krajewski considers the possible liability for companies for their own actions essential, whereby formulations dealing with the presumption of control and joint liability are integrated into the regulations. Furthermore, compliance with human rights due diligence (DD) standards can be a, but not the only, factor to be considered when determining liability.[20]

The international human rights law is binding, especially when the appropriate articles/sources are covered by customary international law, which is applicable to most the cases.[21] However, this does not apply directly to companies because they are not legal subject in international law. However, recently the meaning of the term "subject of international law" has been broadened to include multinational enterprises under exceptions,[22] whereby these cannot be indisputably bearers of rights and obligations under international law.[23] Indeed, similar expressions of will by the states often contribute to the emergence of customary law.[24] States have addressed the human rights responsibilities of business enterprises most directly in soft-law instruments - in the sense means that it does

[16] UNCHR 'Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights: draft Norms / submitted by the Working Group on the Working Methods and Activities of Transnational Corporations pursuant to resolution 2002/8' (26th August 2003) UN Doc E/CN.4/Sub.2/2003/12.
[17] Sascha Dov Bachmann/Pini Pavel Miretski 'Global Business and Human Rights - The UN 'Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' - A Requiem' Deakin Law Review (12th November 2011) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1958537> 9 accessed on 26th April 2022.
[18] Cf. UNCHR 2011 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy Framework' (16th June 2011) UN DOC [ST/] HR/PUB/11/4 1.
[19] Markus Krajewski 'Analysis of the Third Draft of the UN Treaty on Business and Human Rights' (October 2021) 13.
[20] Ibid. 23.
[21] Helmut Volger 'Grundlagen und Strukturen der Vereinten Nationen' (OUP 2007) 86; Scheuermann (N 12) 39.
[22]Katarina Weilert 'Transnationale Unternehmen im rechtsfreien Raum? Geltung und Reichweite völkerrechtlicher Standards' Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (69 2009) 905 ff.
[23] Jan Wiegant 'Internationale Rechtsordnung oder Machtordnung? – Eine Anmerkung zum Verhältnis von Macht und Recht im Völkerrecht' Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (71 2011) 35; Stephan Hobe, 'Einführung in das Völkerrecht' (9 Ed 2008) 64 ff.
[24] Cf. Christina Binder „Die Grenzen der Vertragstreue im Völkerrecht" (OUP 2013) 20.

not by itself create legally binding obligations.[25] It furthermore derives its normative force through recognition of social expectations by states and other key actors.[26] It is generally agreed that the state duty to protect is a standard of conduct, not a result. What this means in relation to business is that states are not *per se* responsible when a business enterprise commits a human rights abuse. However, states may breach their international human rights law obligations if they fail to take appropriate steps to prevent such abuse. This means a duty investigate, punish, and redress it when it occurs or when the acts of an enterprise may be directly attributable to the state e.g., because it merely serves as the state's agent.[27]

Despite a lack of obligation under international law, many companies opt for a voluntary commitment to uphold human rights, which have been developed either by themselves, by their industry (multi-stakeholder initiative standard) or by international organisations. However, in most cases they do not contain sanctions for violations (except for the OECD Guidelines and the Global Compact).[28] It is true that they contribute to strengthen awareness of the importance of human rights. However, it is problematic that the requirements from these sources sometimes diverge and are not transparent enough or require a considerable (bureaucratic) effort in implementation, which in turn hinders international trade.[29] Hereby, the implementation of the UNGP can contribute to standardisation and better comparability.

The UNGP are fundamentally applicable to all companies and states worldwide.[30] In this context, states are encouraged to prevent or prosecute and sanction human rights violations by third parties on their territory. To this end, states should enforce existing regulations on the protection of humans in corporate activities, and ensure that e.g., company law regulations do not obstruct human rights protection. In addition, they are encouraged to support companies in the protection of human rights, and if necessary, introduce reporting obligations. Furthermore, states should ensure human rights protection in their relations with business enterprises e.g., by imposing appropriate requirements when granting loans or awarding contracts.[31] With regard to the increasing focus on legal obligations for companies, they should at least follow the recommendations. Therefore, enterprises should have a publicly available commitment to human rights protection (policy commitment). Further, the implementation of a human rights DD process with a reporting obligation is expected. Moreover, companies must create an effective remedial mechanism, including the establishment of a corporate grievance mechanism. [32] However as there is no direct binding effect between companies and international law, it is left to the respective states to implement the requirements of the UNGP.

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[25] Cf. Marcus Krajewski 'Menschenrechtliche Pflichten von multinationalen Unternehmen in den OECD-Leitsätzen: Taking Human Rights More Seriously?' Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (76 2016) 313.
[26] Birgit Spießhofern 'Wirtschaft und Menschenrechte – rechtliche Aspekte der Corporate Social Responsibility' Neue Juristische Wochenschrift (2014) 2475.
[27] Ruggie (n 6) 84.
[28] CF. Ernest Gnan/Christoph Schneider 'Schwerpunkt Außenwirtschaft 2019/2020 - Special topic: International trade and sustainable development' Wirtschaftskammer Austria (2020) 146.
[29] Thomas Voland ‚Unternehmen und Menschenrechte – vom Soft Law zur Rechtspflicht' Betriebs-Berater (3 2015) 68.
[30] UNCHR 2011 'Guiding Principles on Business and Human Right: Implementing the United Nations "Protect, Respect and Remedy Framework' (16th June 2011) UN Doc [ST/] HR/PUB/11/4 1.
[31] Thomas Voland ‚Unternehmen und Menschenrechte – vom Soft Law zur Rechtspflicht' Betriebs-Berater (3 2015) 70 f.
[32] UNCHR 2011 'Guiding Principles on Business and Human Right: Implementing the United Nations "Protect, Respect and Remedy Framework' (16th June 2011) UN Doc [ST/] HR/PUB/11/4 15 f.

The connection between the UN and the EU

The EU, the successor to the European Communities, has been an observing member of the UN since 1974. Even if relations between the UN and the European integration project go back into the 1960s, it was only at the beginning of the new millennium that the two actors discovered each other as real pillars in the effort for a peaceful world.[33] On 3r May 2011, the European Union was granted the privilege of 'special observer status' by the resolution 65/276.[34] Therefore, the EU is the only organisation that has an extended right to speak and to make proposals, although the right to vote is still only reserved for the member states.

Thus, the manifestation of the strong connection between the parties is also contained in the most important legal sources. Within EU law, the link to the UN is recognisable e.g., Article 220 I TFEU and Article 34 I TEU contain provisions on cooperation with the UN. At the same time, the EU is active in all UN policy areas because it aims to address all global problems and meet these challenges with multilateral solutions. In 2012, the EU adopted a human rights package to enable the most coherent and efficient possible participation of the EU at the UN level in the primarily intergovernmental policy field of human rights.[35] This package of measures to strengthen the EU's voice was also with regard to the UN Human Rights Council, where the EU acts as an observer alongside its member states. The EU has a coordinating body for shaping its human rights policy in the UN of the Political and Security Committee. This Working Group continuously monitors how human rights around the world and prepares positions on general trends and individual events.[36]

European Implementation of human rights

In October 2011, the EU presented its own strategy for CSR, which contains a strong link to the UNGP.[37] This was preceded by the EU's Green Deal,[38] and its European Multi-Stakeholder Forum on CSR, the former including sanctions against companies that violate principles, as defined in Art. 7 TEU. Further, in March 2020, the European Commission published the updated EU Action Plan on Human Rights and Democracy for 2020-2024.[39] Among other things, the promotion of a global system for human rights and democracy is one of its main priorities. Under the EU Non-financial Reporting Directive (2014/95/EU),[40] companies are required to disclose their human rights risks, impacts, and DD in their annual reports. Only companies with more than 500 employees are required to publish their reports.

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[33] Manuela Scheuermann 'UN-BASIS-INFORMATIONEN 42, Die Europäische Union und die Vereinten Nationen' (Deutsche Gesellschaft für die Vereinten Nationen e.V. 22nd December 2018) <https://dgvn.de/veroeffentlichungen/publikation/einzel/die-europaeische-union-und-die-vereinten-natione> accessed on 2nd April 2022 1.

[34] UNGA RES 65/276 (3rd May 2011) UN DOC A/RES/65/276.

[35] Cf. General Secretariat of the Council 'EU Annual Report on Human Rights and Democracy in the World in 2012' 9431/13 ADD 1 REV 1.

[36] Manuela Scheuermann 'UN-BASIS-INFORMATIONEN 42, Die Europäische Union und die Vereinten Nationen' (Deutsche Gesellschaft für die Vereinten Nationen e.V. 22nd December 2018) <https://dgvn.de/veroeffentlichungen/publikation/einzel/die-europaeische-union-und-die-vereinten-natione> accessed on 2nd April 2022 7.

[37] European Commission 'A renewed EU strategy 2011-14 for Corporate Social Responsibility' COM (2011) 681 final.

[38] European Parliament 'Resolution on a European strategy for sustainable, competitive and secure energy (Green paper)' 2006/2113(INI).

[39] European Parliament and the Council 'EU Action Plan on Human Rights and Democracy 2020-2024' JOIN (2020) 5.

[40] European Parliament and the Council 'Disclosure of non-financial and diversity information by certain large undertakings and groups' Directive 2013/34/EU.

However, there are still other direct connections of CSR in regulations such as the Anti-torture Regulation (EU) 2019/125,[41] or the EU regulation on sustainability-related disclosures in the financial services sector (EU) 2019/2088.[42]

In recent years, there has been a trend towards including human rights and social obligations in EU (free) trade agreements and investment protection agreements. This should be achieved by an expanding trade policy which includes aspects of environmental protection, climate protection, human rights and working conditions, that influence states actions and thereby the general situation in regional territories of the partners country. The legally binding effect of human rights in this type of agreement results less from the resolution itself than from the contractual correlation.[43] According to the ECJ (C-581/11 P-Mugraby) a contractual cooperation should not be terminated or suspended in the event of human rights violations, but rather appropriate measures should be taken.[44]

Nevertheless, it is disputed whether companies can be the subject of international agreements.[45] Numerous agreements recognise that companies – and not only their home states – can invoke the right to property or the principle of a fair trial.[46] Furthermore, companies can bring proceedings before the European Court of Human Rights based on the European Convention for the Protection of Human Rights and Fundamental Freedoms and its additional protocols.[47] Expert opinions differed widely on whether the EU has so far taken sufficient action to regulate human rights. According to a study on corporate DD in the supply chain published in 2020 by the European Commission, it is found that one third of European companies do not comply with human rights DD requirements; fifty-five per cent meet less than half of the tested requirements.[48] This shows that actual application in practice has not yet arrived to a sufficient extent.

Human Rights under European Law – the EU Supply Chain Act

On 23 February 2022, the European Commission adopted a proposal for a Directive on corporate DD in the field of sustainability. This directive aims to promote responsible and sustainable behaviour by companies in global value chains. Companies will thus be obliged at European level to identify, prevent, end or mitigate adverse impacts of their actions on

[41] European Parliament and of the Council Regulation (EU) 2019/125 of 16th January 2019 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment.
[42] European Parliament and of the Council Regulation (EU) 2019/2088 of 27th November 2019, sustainability-related disclosures in the financial services sector (Text with EEA relevance).
[43] Winfried Huck/Claudia Kurkin 'Die UN-Sustainable Development Goals (SDGs) im transnationalen Mehrebenensystem' Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (78 2018) 379.
[44] Case C-581/11 *P Mugraby v Council of the European Union and European Commission* (2012) ECR-I 70.
[45] Katarina Weilert 'Transnationale Unternehmen im rechtsfreien Raum? Geltung und Reichweite völkerrechtlicher Standards' Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (69 2009) 905 ff.
[46] Thomas Voland ‚Unternehmen und Menschenrechte – vom Soft Law zur Rechtspflicht' Betriebs-Berater (3 2015) 68.
[47] Ibid.
[48] European Commission, study on 'directors' duties and sustainable corporate governance (29th July 2020) <https://op.europa.eu/de/publication-detail/-/publication/e47928a2-d20b-11ea-adf7-01aa75ed71a1/language-en> accessed on 11th February 2022 97.

the environment and human rights. The purpose is to create legal certainty, transparency for consumers, and a level playing field.[49]

Scope of Application

The Directive affects two groups of EU companies. Firstly, all EU limited liability companies with at least 500 employees and a net turnover of at least 150 million euros worldwide. Secondly, limited liability companies that are active in defined resource-intensive business areas, and who do not meet the thresholds of the first group, but have at least or more than 250 employees and generate a net turnover of at least 40 million euros worldwide. It should be noted that for the latter group, the regulations apply two years later than for the first group. Also included are companies from third countries that are active in the EU and generate a turnover equal to the above-mentioned groups within the EU. The Directive additionally applies to subsidiaries and the value chains.[50]

The Measures

The EU Supply Chain Act imposes measures on the companies concerned, that they must comply with their obligation. Companies must identify their actual and potential negative impacts on the environment and human rights and respond appropriately to prevent, mitigate and remedy these impacts. Furthermore, DD must be implemented in the company's policy and management system, and a grievance mechanism must be established with the assurance that every potentially affected party along the supply chain has access to it. The company is also responsible for providing information to the public to create transparency and demonstrate compliance with DD obligations. This includes an annual report. The measures taken must be controlled and monitored. Further, companies whose annual turnover is higher than 150 million euros must align their internal guidelines with the goal of the Paris Agreement, so that the goal of limiting global warming to 1.5 degrees Celsius can be achieved.[51] Thus, the DD requirements are very similar except for the more far-reaching regulations regarding the environmental aspect.

Liability

The competent national authorities of the Member States will supervise the companies and impose fines in case of non-compliance with the DD obligations carried out. An additional instrument is that victims of violations that could have been avoided by the company will be able to take legal action in the future.[52]

Art. 1(8) of the Draft Directive requires Member States to guarantee that the national competent authorities act independently and that all auditors, experts and employees act neutrally. The purpose of the Draft Directive is to create a European network of supervisory authorities. Compared to the German Supply Chain Act, the proposed Directive is stricter

[49] European Commission 'Just and sustainable economy: Commission lays down rules for companies to respect human rights and environment in global value chains' (2022) <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1145> accessed 1st May 2022.
[50] European Commission 'Just and sustainable economy: Commission lays down rules for companies to respect human rights and environment in global value chains' (2022) <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1145> accessed 1st May 2022.
[51] Kai Leisering 'EU Supply Chain Law Obliges Companies to Operate in a Fair and Sustainable Manner' (2022) <https://www.eqs.com/compliance-blog/eu-supply-chain-law/> accessed 1st May.2022
[52] European Commission 'Just and sustainable economy: Commission lays down rules for companies to respect human rights and environment in global value chains' (2022) <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1145> accessed 1st May 2022.

at the European level. For example, Art. 18(4) provides that one possible official measure after an appropriate period can be to order the omission of violations of the DD obligations as well as their termination or elimination (Art. 18 (5) of the Draft Directive). Another possible sanction is the imposition of fines. Furthermore, it should be possible to demand damages from a company according to Arts. 20, 22 Draft Directive. According to Article 20, Member States are required to impose effective sanctions and to make the decisions public. Furthermore, when imposing sanctions, the efforts made by companies to comply with DD obligations should be considered.

The amount of the fine should be based on the turnover of the companies. With respect to liability, the European Union would prefer to strive for standardisation, as similar laws have already been passed in some Member States containing divergent regulations about liability (Germany, basically, no liability; France, basically, liability). The harmonisation of the internal market, the avoidance of a divergence of legal framework conditions, as well as directives regarding product liability and similar enactments, indicate that the EU has the regulatory competence for this project. Starting with the breach of duty, Art. 22(1) provides that companies shall be liable for damages if they have not fulfilled their duties according to Art. 7 and Article 8 (risk management), and an environmental or human rights violation and damage have occurred as a result. It is still unclear whether fault-based liability will be enforced or whether a breach of duty will remain. National or EU liability provisions remain unaffected if they provide for stricter liability rules, or if they regulate contents that are not addressed by the Draft Directive. This is the case for Directive 2004/35/EC, Recital 62 of the Draft Directive and, at the German level, the Environmental Liability Act.[53]

Effects for companies from third countries

The European Commission's proposal for a Directive will also affect companies from third countries that sell goods or provide services in the European Single Market. The purpose is to avoid competitive disadvantages for domestic companies compared to those abroad, which are active in the internal market. The European Commission bases this on turnover and not on the number of employees, as uncertainties can arise due to different legal definitions of the term "employee".[54]

Human Rights under German law

In order that regulations of international law can be applied in German law and become binding in domestic law, a legal principle of international law must be incorporated into the respective national legal order by a state decision (constitution or law).[55] The implementation of general rules of international law are part of federal law. They take precedence over laws and generate rights and obligations directly for the inhabitants (Article 25 of the Basic Law); for which the transposition of European law applies the precedence principle. This implies that European law is superior to the national laws of Member States,

[53] Gerald Spindler ‚Der Vorschlag einer EU-Lieferketten-Richtlinie' Zeitschrift für Wirtschaftsrecht (16 2022) 773 ff.
[54] Ibid. 767.
[55] Bundeszentrale für politische Bildung 'Völkerrecht – Internationales Recht' <https://www.bpb.de/23189/voelkerrecht/> accessed on 8th May 2022.

whereas the precedence principle applies to all European acts with a binding force.[56] States may enact their own regulations, but these may not contradict the relevant European law.

The implementation of human rights is therefore embedded in German Constitutional Law, Article 20a of the Basic Law, "Mindful also of its responsibility toward future generations, the state shall protect the natural bases of life by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order." This is interpreted as a "duty to protect" by public authorities, which extends from environmental subjects to human right questions.[57] According to the judgment of the German Federal Constitutional Court there is the "(...) obligation to take all steps necessary to minimise the risk of human rights violations."[58] Such duty also encompasses putting in place administrative and judicial procedures aimed at preventing and redressing human rights violations.

The UNGPs, and in general the voice of the UN, encourage states to pass legislation on DD. In previous years, several Member States have enacted legislation relating to human rights DD measures as National Action Plans (NAP). For several decades, attempts have been made to encourage these companies to recognise DD in these areas on a voluntary basis. Academic research as well as studies commissioned by the EU institutions have clearly shown that the voluntary approach is insufficient.[59] This is also clearly shown by the German NAP for Business and Human Rights of 21 December 2016,[60] which was intended to advance the implementation of the UNGP. For this purpose, companies were surveyed on a multi-year basis to assess the status of the voluntary implementation of these core elements of human rights DD.[61] Within the last monitoring in 2020, only 13 to 17 per cent of the companies surveyed complied with the requirements of the NAP.[62] An additional 10 to 12 per cent of the companies are on a 'good path'.[63] Further, the NAP's do not prescribe any penalties for lack of compliance.

The German NAP describes in detail companies' responsibilities to respect human rights according to the UN Guiding Principles. It *inter alia* sets a goal for 50 per cent of all

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[56] European Union 'Glossary of summaries - Primacy of EU law' <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:primacy_of_eu_law#:~:text=The%20principle%20of%20the%20primacy,) %2C%20EU%20law%20will%20prevail> accessed on 25th April 2022.

[57] Jessica Stubenrauch 'Ein Menschenrecht auf Wasser' Zeitschrift für Umweltrecht (November 2010) 521.

[58] German Federal Court (BVerfG), Case 2 BvF 2/90, 2 BvF 4/90, 2 BvF 5/92 (1993).

[59] European Parliament 'Towards a mandatory EU system of due diligence for supply chains' (22nd October 2020) < https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI (2020)659299> Accessed on 9th May 2022.

[60] The Federal Government 'National Action Plan – Implementation of the UN Guiding Principles on Business and Human Rights 2016 – 2020' (21th December .2016) <https://www.auswaertiges-amt.de/blob/610714/fb740510e8c2fa83dc507afad0b2d7ad/nap-wirtschaft-menschenrechte-engl-data.pdf> accessed on 20th March 2022.

[61] German Government 'Interministeriellen Ausschusses Wirtschaft und Menschenrechte der Bundesregierung „Statusbericht"' (31th August 2021) <https://www.auswaertiges-amt.de/blob/2476592/169c6c24c564c6b85da96d33099bcf3c/nap-statusbericht-2021-barrierefrei-data.pdf> accessed on 30th May 2022 1f.

[62] Cornelia Heydenreich i.a. 'Vier Jahre Nationaler Aktionsplan Wirtschaft und Menschenrechte (NAP) - Schattenbericht der Zivilgesellschaft' (August 2021) <https://www.germanwatch.org/sites/default/files/Schattenbericht_2021_NAP.pdf> accessed on 10th April 2022 19.

[63] German Government 'Interministeriellen Ausschusses Wirtschaft und Menschenrechte der Bundesregierung, Statusbericht"' (31th August 2021) <https://www.auswaertiges-amt.de/blob/2476592/169c6c24c564c6b85da96d33099bcf3c/nap-statusbericht-2021-barrierefrei-data.pdf> accessed on 25th March 2022 31.

companies with more than 500 employees to have a human rights system in place by 2020. In addition, there are many other areas where the goals of the NAP's have not been achieved. These include e.g., the lack of ratification of the US social pact or the ILO Convention on minimum wage setting, as well as the lack of participation in the sessions for the Binding Treaty on Business and Human Rights.[64] Since the NAP, which was to be implemented by 2020, the German government has not published a follow-up document.

The German Supply Chain Act

The Supply Chain Act at federal level was passed by the German Bundestag on 11 June 2021. It will come into force on 1s January 2023. Along with the entry into force, the companies covered by the scope of application will be subject to a series of obligations to ensure that human rights-related and environmental DD obligations are complied with.[65] The German Supply Chain Act (SCA) is not unique. The United Kingdom, the Netherlands and France have already adopted similar regulations. There is also a proposed directive at the European Union level.[66] Compliance measures should already be started to meet the challenges of the law.[67] In the following, first the scope of application of the German Supply Chain Act will be discussed, followed by the measures, special attention being paid to risk management and finally liability.

Scope of Application

According to section 1 I of the SCA, all enterprises that employ more than 3,000 workers in Germany, and have a head office, main office or branch office or their registered office in Germany, are covered by the scope of application. The legal form of the enterprise is irrelevant. It should be noted that the threshold of the scope of application will decrease to 1,000 employees from 1 January 2024. Employees who have been posted abroad will be included. In addition, according to section 1 III SCA, the employees of the affiliated companies of the parent company within the meaning of section 15 German Stock Corporation Act are included. Thus, at least as of 1 January 2024, many companies will be affected by the SCA. Companies that are not covered by the scope of application will nevertheless feel its effects due to a so-called "trickle-down effect", as the companies that fall under the scope of application will transmit the necessary measures for compliance with the statutory provisions to them via contracts.[68]

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[64] Cornelia Heydenreich i.a. 'Vier Jahre Nationaler Aktionsplan Wirtschaft und Menschenrechte (NAP) - Schattenbericht der Zivilgesellschaft' (August 2021) <https://www.germanwatch.org/sites/default/files/Schattenbericht_2021_NAP.pdf> accessed on 10th April 2022 30

[65] Eric Wagner/Marc Ruttloff ‚Das Lieferkettensorgfaltspflichtengesetz – Eine erste Einordnung' Neue Juristische Wochenschrift (30 2021) 2145.

[66] European Commission, „Just and sustainable economy: Commission lays down rules for companies to respect human rights and environment in global value chains" (23rd February 2022) <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1145> accessed 30th April 2022.

[67] Eric Wagner/Marc Ruttloff ‚Das Lieferkettensorgfaltspflichtengesetz – Eine erste Einordnung' Neue Juristische Wochenschrift (30 2021) 2145.

[68] Eric Wagner/Marc Ruttloff ‚Das Lieferkettensorgfaltspflichtengesetz – Eine erste Einordnung' Neue Juristische Wochenschrift (30 2021) 2145; Federal Ministry of Labour and Social Affairs 'Supply Chain Act – Act on Corporate Due Diligence Obligations in Supply Chain' <https://www.csr-in-deutschland.de/EN/Business-Human-Rights/Supply-Chain-Act/supply-chain-act.html> accessed 30th April 2022.

Furthermore, foreign companies are also included, based on the resolution recommendation and a report of the Committee for Labour and Social Affairs. This is the case if a foreign company has a branch within the meaning of section 13 d German commercial code in Germany and employs at least 3,000 workers there.[69]

The Measures

The DD obligations of companies are defined in section 3 SCA. In this context, companies are to observe the duties of care imposed on them in 'an appropriate manner'. This is to ensure that violations of the prohibitions defined in section 2 II and III SCA are prevented.

The legal position protected by section 2 II SCA can be divided into twelve subsections. These include: the prohibition of the employment of children under the minimum permissible age; slavery, forced labour; disregard of labour protection as well as freedom of association; discrimination; inadequate payment of wages; environmental aspects such as, among others, harmful soil change and water pollution; unlawful forced eviction; the use of security forces if there is an associated threat of injury; as well as a general prohibition of acting in such a way that human rights are violated in a particularly serious manner.

The duties of DD which the enterprises are to observe according to the SCA include the establishment of a risk management system (section 4 I SCA); the performance of the risk analysis associated with risk management (section 5 SCA); the definition of an internal responsibility (section 4 III SCA); the adoption of a policy statement (section 6 II SCA); the creation of preventive measures in the own business operations as well as with regard to direct suppliers (section 6 I, III, IV SCA); remedial measures (section 7 I to III SCA); the implementation of a complaints procedure (section 8 SCA); the implementation of DD obligations with regard to risks that may arise with indirect suppliers (section 9 SCA); and finally a documentation obligation (section 10 I SCA), and reporting (section 10 II SCA). The adequacy of these obligations is defined in section 3 II SCA and is determined by the type and scope of business activity, the possibility of exerting influence on direct polluters, the expected severity of the violation and the probability of its occurrence as well as the contribution to causation about environmental or human rights risks. It should be noted that this is not a guarantor or success obligation.[70]

The Bundestag states that more efforts can be left to the company, measured by the possibility of influence, the probability and severity of the expected violations and the size of the contribution to causation.[71]

Risk Management and Risk Analysis

[69] Michael Nietsch/Michael Wiedmann 'Adressatenkreis und sachlicher Anwendungsbereich des neuen Lieferkettensorgfaltspflichtengesetz' Neue Juristische Wochenschrift (1 2022) 1.
[70] Erik Ehmann/Daniel F. Berg 'Das Lieferkettensorgfaltspflichtengesetz (LkSG): ein erster Überblick' GWR Gesellschaft und Wirtschaftsrecht (15 2021) 287ff.; Federal Ministry of Labour and Social Affairs 'Supply Chain Act – Act on Corporate Due Diligence Obligations in Supply Chain' <https://www.csr-in-deutschland.de/EN/Business-Human-Rights/Supply-Chain-Act/supply-chain-act.html> accessed 30th April 2022.
[71] Deutscher Bundestag 'Gesetzesentwurf der Bundesregierung – Entwurf eines Gesetzes über die unternehmerische Sorgfaltspflicht in Lieferketten' (19th April 2021) BT-Drucksache 19/28649 42.

As already explained, every company must implement effective risk management and carry out the associated risk analysis. This part represents the first step in order to comply with the DD obligations laid down in the Supply Chain Act. Thus, the company must first analyse the supply chain and determine in which part of it a potential risk for human rights or environmental law violations could exist.[72] The company should then identify risks for its own business unit and direct suppliers, as well, if necessary, for indirect suppliers. With the help of this risk analysis, violations of human rights and environmental aspects should be prevented, or stopped, and minimised.[73]

For example, a company can identify risks through supplier interviews, on-site inspections, and discussions with potentially affected stakeholders such as residents, trade unions or workers. The findings should then be classified into risk areas. The locations in the respective countries, the business areas and the products that are manufactured or sold, can play a role in this. These identified risk areas should then be prioritised. Relevant factors are the type and scope of the business, the assessment of the company's possibilities to influence the direct infringer, the possible severity of the infringement, the reversibility of the infringement, the assessment of the probability that the infringement will occur and finally the type of contribution to causation by the company itself.[74]

Establishing an internal responsibility for the company

In order to fulfil the DD obligations, companies must, among other things, create an internal responsibility. One example is to appoint a human rights officer.[75]

The adoption of a policy statement

The policy statement must contain a description of how the company complies with the DD obligations. Secondly, it must describe what risks have been identified in the risk analysis and the expectations that the company has with regard to human rights and environmental aspects vis-à-vis its employees and suppliers. These policy statements are usually brief and provide an overview of the company's recognition of its responsibilities, the risks identified, and the measures taken against (potential) human rights violations. The company should regularly check whether the policy statement is sufficiently specific. All points should be set out at least in essence. Finally, the policy statement should be considered part of the code of conduct and should be made available and communicated to suppliers, employees as well as the works council and the public.[76]

Establishment of prevention measures in own business operations and direct suppliers

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[72] Federal Ministry of Labour and Social Affairs 'Supply Chain Act – Act on Corporate Due Diligence Obligations in Supply Chain' <https://www.csr-in-deutschland.de/EN/Business-Human-Rights/Supply-Chain-Act/supply-chain-act.html> accessed 30th April 2022.
[73] Initiative Lieferkettengesetz 'What the new Supply Chain Act delivers- and what it doesn't' (11th June 2021) 3.
[74] Taylor Wessing 'Guide to the German Supply Chain Due Diligence Act' (28th July 2021) <https://www.taylorwessing.com/-/media/taylor-wessing/files/germany/2021/07/tw_2021_guide-to-the-german-supply-chain-due-diligence-act_30072021.pdf > accessed on 30th May 2022 2.
[75] Federal Ministry of Labour and Social Affairs 'Supply Chain Act – Act on Corporate Due Diligence Obligations in Supply Chain'<https://www.csr-in-deutschland.de/EN/Business-Human-Rights/Supply-Chain-Act/supply-chain-act.html> accessed 30th April 2022.
[76] Taylor Wessing 'Guide to the German Supply Chain Due Diligence Act' (28th July 2021) <https://www.taylorwessing.com/-/media/taylor-wessing/files/germany/2021/07/tw_2021_guide-to-the-german-supply-chain-due-diligence-act_30072021.pdf > accessed on 30th May 2022 3.

Following risk analysis, the company must implement effective preventive measures. One way to comply with environmental DD obligations is to develop sustainable purchasing practices. In addition, a significant influence can be exerted on the risk of human rights risks arising by means of contract design. Particularly in the case of contracts with suppliers in the high-risk sector, greater care must be taken to ensure that the contractual design does not increase the probability of violation. Bonus incentives for suppliers can also be an effective system to motivate suppliers to achieve sustainability goals. In addition, it can be helpful to train staff to raise awareness (especially in purchasing). It should be noted that the measures taken must be checked for effectiveness. It is helpful to follow the advice given by the established complaints system. Then the measures must be adapted.[77]

Remedial measures

If (imminent) violations of human rights or of the environment are identified, the company must immediately take appropriate remedial action. The prerequisite is that the measures are appropriate to prevent, end or at least minimise violations. In the case of inadequacy, it is possible that a fine will be imposed on the company. The same applies if this case occurs with indirect suppliers and the company had "reasonable knowledge". If the company is not able to stop the violations at direct or indirect suppliers, the company must at least develop a plan to stop or mitigate the violation. This can be done in cooperation with the supplier. Ultima ratio would be to discontinue the business relationship with the supplier. A company has an obligation to terminate the business relationship with a supplier if there is a serious violation of a protected legal right, the remedial plan is not effective, and the company has no other mitigating means at its disposal.[78]

The implementation of a complaint's procedure

Companies are obliged to establish a complaints procedure to give affected persons the opportunity to report violations of human rights and environmental aspects. This can be associated with the problem that those affected may not even know the suppliers or companies and therefore do not know who they can turn to. To counter this problem, companies should disclose their supply chains in such a way that potentially affected persons could access the complaints procedure. It is helpful to establish a comprehensive grievance mechanism, such as industry wide.[79]

Documentation and reporting obligation

Companies must report once a year on the fulfilment of their DD obligations. For this purpose, companies should document the steps taken on an ongoing basis. After the preceding DD obligations have been presented an outlook for the future should be provided. The Federal Office of Economics and Export Control (BAFA) is responsible for this and provides electronic access to the report format.[80]

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[77] Taylor Wessing 'Guide to the German Supply Chain Due Diligence Act' (28th July 2021) <https://www.taylorwessing.com/-/media/taylor-wessing/files/germany/2021/07/tw_2021_guide-to-the-german-supply-chain-due-diligence-act_30072021.pdf > accessed on 30th May 2022 4.
[78] Initiative Lieferkettengesetz 'FAQ on Germany's Supply Chain Due Diligence Act' (2021) <https://lieferkettengesetz.de/wp-content/uploads/2021/11/Initiative-Lieferkettengesetz_FAQ-English.pdf> accessed on 30th May 2022 10f.
[79] Ibid. 18.
[80] Taylor Wessing 'Guide to the German Supply Chain Due Diligence Act' (28th July 2021) <https://www.taylorwessing.com/-/media/taylor-wessing/files/germany/2021/07/tw_2021_guide-to-the-german-supply-chain-due-diligence-act_30072021.pdf > accessed on 30th May 2022 8.

Liability

In cases where companies do not comply with their DD obligations under the Supply Chain DD Act, fines can be imposed. The amount of these fines is up to 2 per cent of the annual global turnover or up to 8 million euros. There is the restriction that the fine system based on turnover only applies to companies with an annual turnover of more than 400 million euros. In addition, there is the possibility that companies may not participate in the awarding of public contracts if a fine of a certain amount has been imposed.[81]

Conclusions

In summary, human rights protection has now reached all levels of the legal system. The cornerstone for the observance of human rights is above all the UN, which encourages its member states to take more responsibility by issuing corresponding regulations. The extent to which individual countries submit to these must be assessed on a case-by-case basis, as not all 193 member states undertake a general ratification of new legal sources. Moreover, the application of the national exhaustion of remedies may bypass the question with respect to human rights, and specifically whether companies can constitute a subject in the sense of international law and thus form part of international treaties. Within Europe, many countries have already addressed this issue and enacted independent remedies to protect human rights in relation to the economic activities of companies and their supply chains.

In general, the EU's proposed Directive contains similar measures to the Supply Chain Sourcing Obligations Act at the German level, but includes stricter liability rules. In both, the focus is on risk management and associated risk analysis. These two components form the starting point for companies to adequately fulfil their human rights DD obligations. Companies from third world countries are also held responsible. Both the German Supply Chain Act and the proposed Directive at the EU level provide for DD obligations to be fulfilled by companies falling under the respective scope of their application. These obligations are very similar in both laws, whereby the EU Directive proposal is more far-reaching on environmental obligations. The starting point in each case is risk management and the associated risk analysis. As soon as this is not implemented in a functional manner and thus violations of DD obligations occur, sanctions or liability can be imposed. Under the German Supply Chain Act, violations result in fines or exclusion from public procurement. At EU level, liability is more extensive, so that additional damages can be claimed. As things stand, the German government has not yet published a renewed version of the NAP to implement human rights into the economy.

Although some points are covered by the introduction of the German Supply Chain Act, other important objectives of the NAP have fallen out of focus. Overall, it can be said that both the German Supply Chain Act and European regulation meet the expectations of the UNGP and, thus, the legal ideas of international law regarding the integration of human rights into business practice.

[81] Business and Human Rights „Supply Chain Act" <https://www.csr-in-deutschland.de/EN/Business-Human-Rights/Supply-Chain-Act/supply-chain-act.html> accessed 1st May 2022.

Outer space: a possible safe haven and the jurisdictional scores on extradition

Olatinwo Khafayat Yetunde*

Introduction

The obvious instinct for law offenders, upon commission of offence - to evade arrest, prosecution and possible sentence - has led to seeking hideout in different countries. While it may be easy for sovereign states to strike deals in the form of bilateral agreement on extradition to return fugitives back to the state where the crime is committed for the purpose of prosecution, it may not be so in other climes. The readiness to return fugitives is responsible for dozens of bilateral agreements between countries. Even when there is not any extradition treaty between two countries, there is always the willingness to surrender when needs be. This was seen in the case between the United States of America and China in 2014 when the US returned two corruption suspects to China ahead of a summit between the presidents of the two countries, despite the absence of a treaty. Similar arrangement may not be so easy in other hideouts, like outer space, as the pristine territory is clothed with the concept of common heritage, belonging to humankind and not to a particular country, international organisation or individual, whether juristic or natural. This environment, capable of habitation by human beings, is estimated to begin around 80km-100km above the surface of the earth and has special international legal regimes to regulate human activities. Thus, the question is: how will such a fugitive be extradited from places unimaginable like outer space, and under whose jurisdiction is the fugitive while in space? This article will assess the possibilities of fugitives escaping to Outer Space, and the legal consequences of their presence; i.e. under whose jurisdiction and the possibility or otherwise of their extradition from this environment.

In 2017, Joaquin "El Chapo" Guzman, a drug lord was extradited from Mexico to the United States of America for prosecution.[1] Extradition to requesting states is not limited to suspects who are citizens of the requesting states, but also is extended to citizens of the requested states. Such is the case with Guzman, a Mexican citizen. At the same time, extradition of nationals is greatly frowned on by many countries as seen with many civil law jurisdictions. Countries such as France, Qatar and Lebanon have codified the principle against extradition of nationals in their national law, while it is also in the constitutions of countries such as Greece and Germany.

Common law jurisdictions are open to extradition of their nationals, as countries such as the UK believe in the principle of territorial jurisdiction as opposed to the principle that a national can only be tried by a national judge. This is exemplified in the 1662 refusal of the Dutch Republic to grant the extradition request of the UK as the suspect was a Dutch national. While the Netherlands would surrender its citizens only after prosecution by the

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[1] Jonathan Masters, 'what is Extradition?' Council on Foreign Relations (New York, January 08 2020) http:///www.cfr.org/backgrounder/what-extradition> accessed 14 October 2021

requesting state, the suspect would be returned to Netherlands to serve his sentence in his country.[2]

Evolution of a series of bilateral treaties on extradition so far reflect the willingness of countries to surrender their nationals irrespective of jurisdiction, as the principle of territorial jurisdiction seems more accepted than national jurisdiction.[3] According to Julie, 'the opposition, between the well-established principle of territorial jurisdiction on the one hand, and the legitimate interest for a state to protect its citizens from foreign justice on the other, explains why there is no uniform rule prescribing or banning the extradition of nationals in international law or state practice'.[4] This assertion is exemplified in the bilateral arrangement on extradition between France and the United States, which states:

> there is no obligation upon the requested State to grant the extradition of a person who is a national of the requested state, but the executive authority of the United States shall have the power to surrender a national of the United States if, in its discretion, it deems it proper to do so.[5]

News that an individual secessionist (as in the case of Kanu) or elder statesman has fled the country in order to evade the legal consequences of his/her abuse of office is not new in African countries nowadays, especially, Nigeria.[6] The world has witnessed an increase in the number of political fugitives almost on a daily basis, especially in developed economies with well-regulated policing and an organised extradition system. Extraditions are serious business, often met with rigorous bureaucracies and political agenda irrespective of the presence of existing extradition treaties be it bilateral or multilateral.

Except for some countries such as South Africa, Ghana, Ethiopia and Nigeria, the subject of outer space is still viewed in the abstract in most African countries. Even those African countries that have participated in the use of space have not gained the best of potential on space exploitation. Hence, discussion that a fugitive may seek hideout in outer space may seem mundane and unimaginable to some ears. Efforts of African leaders, as observed in its AU Agenda 2063 and the African Space Policy, is highly commendable, promoting an ideal African space-based program to enable Africa to be a responsible and peaceful user of outer space. This article will assess the possibilities of fugitives escaping to Outer Space, and the legal consequences of their presence and extradition from this environment. It also covers further and more general aspects relating to the law of Outer Space.

Outer Space: a common heritage

The narratives on individual nation's attitudes to extradition are apt as they reflect national beliefs, interest, jurisdiction and, above all, sovereignty. The reason for different legislations or principles on extradition rules rest on the principle of sovereignty, whereby respective states or international regional organisations determine what happens to its nationals on extradition request. This is because it has absolute control and power over it territory without

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[2] Serving a foreign sentence in the Netherlands<https://www.government.nl/topics/sentences-and-non-punitive-orders/serving-a-foreign-sentence-in-the-netherlands> accessed 27 January 2022

[3] *George Udeozor v Federal Republic of Nigeria* (2007)LCN/2249 (CA), (2007)LPELR-CA/LA/376/05

[4] William Juliw, 'The Rule against the Extradition of National: Overview and Perspectives' http://www.ibanet.org/article/22AF1681-37A0-487A-A660-3ACA32938540> accessed 15 October 2021

[5] *Extradition Treaty between France and United State* Signed in Paris on 23 April 1996 and came into force on 1 February 2002. Art. 3

[6] Taiwo Ojoye, 'Terrorism charge: Nnamdi Kanu flees, goes into hiding' Punch, Nigeria 17 September 2017 https://punchng.com/terrorism-charge-nnamdi-kanu-flees-goes-into-hiding/ accessed 7 June 2022.

interference.[7] Outer Space on the other hand is not a subject of domestic regulations,[8] but, stricto sensu, that of international affairs with special International legal regimes.[9] It is a subject of its own kind, shrouded in the principle of common heritage, i.e. *res communis.*

The environment is the area outside the atmosphere of the Earth where the other stars and planet are situated. According to Scott, providing an exact definition of Outer Space has proven to be an issue and suggestions on the point of demarcation range between 80km to 100km.[10] In fact, issues on spatial delimitation have affected how 'outer space' is described in the domestic laws of some states. For instance, the National Aeronautics and Space Act defines Outer Space as "the areas outside the Earth's atmosphere",[11] while the National Space Law of South Africa defines it as "the space above the surface of the Earth from a height at which it is in practice possible to operate an object in an orbit around the Earth."[12]

This is in tandem with the proposition of the Soviet Union (Russia) on spatial delimitation at an altitude of 100km, based on the theory that:

> "An Aircraft, as the main subject matter of most of International and Local air law, would never be able to reach such altitude in view of 'their dependency, for purposes of lift, upon a density of air not available in those regions."[13]

> "…space objects orbiting the earth would not descend below such an altitude, as the atmosphere would be dense for staying up in their orbit, the attendant atmospheric drag no longer being compensated by the centrifugal forces resulting from their velocity."[14]

On another hand, Article 2 of the Jordan Civil Aviation Act defines an aircraft as "any machine whose continuous flight in aerospace is derived from air and other reactions above the surface of the Earth"[15]

According to the Outer Space Treaty 1967, 'Outer space, including the moon and other celestial bodies, *is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means'*[16] (Author's italics). This pristine environment or any part of it does not belong to any country, individual (natural or juristic) or inter-governmental or non-governmental organisations It belongs to everybody, to mankind,

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[7] Chicago Convention. Article I. *NSW v Commonwealth* (1975) 135 CLR 337 (the *Seas and Submerged Lands Act Case*) at 479, Jacobs J, '*Island of Palma's case*' (1928)2 UNRIAA, 829; *Legal Status of Eastern Greenland* 1933 PCIJ Ser. A/B No.53:22; *Clipperton Island Case* (1932) 2 UNRIAA, 1105. Chris McGrath. 'Principles of Sovereignty under international law' http://envlaw.com.au/wp-content/uploads/handout_sovereihnty.pdf> accessed 15 October 2021

[8] States are however required to put in place measures for registration and licensing of space activities.

[9] See Article. III of the Outer Space Treaty 1967.

[10] Scott J.S, '*The Tragedy of the Common Heritage of Mankind*' (2008) Stanford Environmental Law Journal Vol. 27: nn 2008 pp 101-157.http://ssrn.com/abstract=1407332>accessed on 7 July 2014.

[11] Section 51, USC S 40302 (5) 2010.

[12] Space Affairs Act 1993 [No. 84 of 1993] G 14917. S.1 (xv).

[13] Yuri Kolossov and Dmitry V. Gonchar, 'Delimitation of Airspace and Outer Space: A Legal View' (2018) Revista Brasileira de Direito Aeronàutico e Espacial. < http://www.sbda.org.br/revista/Anterior/1780.html> accessed 15 October 2015.

[14] Ibid.

[15] Civil Aviation Act No.1 of 2007.

[16] See Article II.

therefore neither capable of being owned nor being legislated upon be a sovereign state. Further:

> The exploration and use of outer space, including the moon and other celestial bodies, shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development, and shall be the province of all mankind. Outer space, including the moon and other celestial bodies, shall be free for exploration and use by all States without discrimination of any kind, on a basis of equality and in accordance with international law, and there *shall be free access to all areas of celestial bodies.* There shall be freedom of scientific investigation in outer space, including the moon and other celestial bodies, and States shall facilitate and encourage international co-operation in such investigation.[17] (Author's italics)

The Moon Treaty 1979 provides more stringent rules on appropriation of the moon and other celestial bodies (Outer Space inclusive),[18] that:[19]

> The Moon and its natural resources are the common heritage of mankind, which finds its expression in the provisions of this Agreement, in particular in paragraph 5 of this article. The Moon is not subject to national appropriation by any claim of sovereignty, by means of use or occupation, or by any other means. Neither the surface nor the subsurface of the Moon, nor any part thereof or natural resources in place, shall become property of any State, international intergovernmental or non-governmental organization, national organization or non-governmental entity or of any natural person. The placement of personnel, space vehicles, equipment, facilities, stations and installations on or below the surface of the Moon, including structures connected with its surface or subsurface, shall not create a right of ownership over the surface or the subsurface of the Moon or any areas thereof. The foregoing provisions are without prejudice to the international regime referred to in paragraph 5 of this article. States Parties have the right to exploration and use of the Moon without discrimination of any kind, on the basis of equality and in accordance with international law and the terms of this Agreement.[20]

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[17] See Article. I.

[18] The provisions of this Agreement relating to the Moon shall also apply to other celestial bodies within the solar system, other than the Earth, except insofar as specific legal norms enter into force with respect to any of these celestial bodies. For the purposes of this Agreement, reference to the Moon shall include orbits around or other trajectories to or around it. Article 1.

[19] Notwithstanding these provisions on non-appropriation, many individuals and states have been seen to lay claims to this environment. See Bogoto declaration 1976, Articles1-3; Countries like the Soviet Union, U.S.A and china have planted flags on the moon, Younis Dar, '*Why China is the third country, not second, to put their flag on the surface of the Moon*, (2020) <http//:wwweurasiantimes.com/why-china-is-the-third-country-not-second-to-put- their-flag-on-the-surface-of-the-moon/?amp> accessed 18 October 2021; Robert K, "*Nemitz vs. United States,* A Case of first Impression, Appropriation, Private Property Rights and Space Law before the Federal Court of the United States*"* (2004) Journal of Space Law Vol. 30. 297-309. See also Wayne W, *"Nemitz vs U.S,* The First Real Property Case in United States Courts" (2004) Proceedings 47th Colloquium (Vancouver) 339-351, and Diederiks-Verschoor I.H.Ph & Kopal V, "*An Introduction To Space Law"* (Third Edition. Wolters Kluwer Law & Business 2008)155-156

[20] Moon Treaty 1979, article. 11

Having laid the foundation for the fundamental difference between the legal status of Outer Space and Earth surface, it is pertinent to discuss and assess the habitability of the environment. In other words, can humans actually live and survive in space?

Is outer space habitable?

Outer space, unlike the cold atmosphere misconception, has no temperature because of the absence of mass. Hence, without oxygen, human beings would not survive up to 15 minutes. Sprigel[21] asserts that:

> …the absence of normal atmospheric pressure (the air pressure found on Earth's surface) is probably of greater concern than temperature to an individual exposed to the vacuum of space [1].Upon sudden decompression in vacuum, expansion of air in a person's lungs is likely to cause lung rupture and death unless that air is immediately exhaled. Decompression can also lead to a possibly fatal condition called ebullism, where reduced pressure of the environment lowers the boiling temperature of the body fluids and initiates transition of liquid water in the bloodstream and soft tissues into water vapor [2]. At minimum, ebullism will cause tissue swelling and bruising due to the formation of water vapor under the skin; at worst, it can give rise to an embolism, or blood vessel blockage due to gas bubbles in the bloodstream.[22]

Human survival in space is very much dependent on an adequate supply of oxygen. The travel to space and presence in space, even with a spacesuit is not without its attendant dangers because of radiation; i.e., the longer the travel and presence in space, the greater the risk of survival. Space scientists are tasked to develop technologies that can ensure human presence and survival for an unlimited period in space[23]

As dangerous as it sounds, astronauts and cosmonauts[24] have been living in ISS[25] since it was launched in 2000.[26] NASA, space corporations and other space Agencies are working towards commercialisation of space in which the environment will not only receive scientist and engineers, but ordinary individuals who are merely tourists. According to Paul Kostek, space travel will only be limited to people who are willing to pay tens of millions of pounds. He stated that the price for space travel as at March 2021 is around US$ 250,000, which is considered lower than before. As with the early years of commercial aviation market, the price was high, deemed risky and uncomfortable, but with technological advancement it was subsequently seen safer, leading to its popular demand and then a continuous reduction in

[21] Mark Springel is a research assistant in the Department of pathology at Boston Children's Hospital.
[22] Mark Springel, 'The Human Body in Space: Distinguishing Facts from Fiction' 30 July 2013 Science in the News, Harvard University <https://sitn.hms.harvard.edu/flash/2013/space-humam-body/> accessed 18 October 2021.
[23] Ibid. Setlow RB, 'The Hazards of Space Travel' (2003) 4 (11). EMBO Reports 1013-1016.
[24] Russian astronauts are usually referred to as cosmonauts.
[25] International Space Station conceptualised and jointly owned by the U.S, Japan, Canada, Russia, UK and members of the European Space Agency (Belgium, Denmark, France, Germany, Italy, Netherlands, Spain, Sweden and Switzerland) is a co-operative programme between these states for the joint development, operation and utilization of a permanently inhabited space station in low orbit. 'International Space Station Legal Framework' <https://www.esa.int/Science_Exploration/Human_and_robotic_Exploration/International_space_station_legal_framework> accessed 22 October 2021.
[26] Michael Greshko, 'Humans have been living in space for 20 years straight' Science News:National Geographic 28 October2020https://www.nationalgeographic.com/science/article/humans-have-lived-on-international-space-station-20-years-straihgt accessed 18 October 2021.

price. This is what is envisaged with space travel; in the long run and with technological development, it will reach and even surpass the level of commercial air transport. Is in this spirit that some companies are already exploring the use of rockets for commercial travel between continents, with a high cost for a quick trip.

Outer space is one of the most sought after areas with abundant resources.

The universe of potential has rich and diverse minerals such as water, oxygen, inert gasses, metals, non-metals and water that can be used to provide raw materials and energy to sustain human existence.[27] According to Duke,[28] longer term application of space resources include new earth orbital operations architectures, construction of solar power satellite (or lunar satellite that beams energy unto the earth), low-valued major constituent of asteroid (water and metals) for use in space, high-valued major constituent of asteroid (e.g. Pt, Pd, Ir) for use on earth, 3He from the Moon for fusion energy, and a wide range of materials for space industrialisation (product manufactured in space for use on earth).[29] Therefore, the future of space travel is imminent and beneficial to attract commercialisation whereby states, NGOs, corporations and individuals are interested.[30] *The n*eed to state that the world's first space hotel, Voyager Station, is scheduled to open in 2027.[31]

With the presence of rare natural resources, free access to all areas of space, the prospect of commercial space travel, and the availability of hotel in outer space, the possibility of it been a possible safe haven is indeed a possibility which requires law to be pro-active in its regulation.

The legal status of individuals in space

Since outer space is an international subject, it relevant to first view the status of an individual in the area under the international regimes regulating that sphere, more especially since the discussion is on extradition of individuals (that have committed an offence on earth) from an environment not subject to state sovereignty. Generally, outer space is regulated by five major legal regimes - the Outer Space Treaty 1967,[32] the Moon Treaty

[27] 'Resources in space: A Universe of Potential' Luxembourg Space Agency <http://space-Agency.public.lu/en/space-resources/ressources-in-space.html> accessed 04 October 2021
[28] Michael Duke, 'Space Resources' <http://www.sciencedirect.com/science/article/abs> accessed 11 October 2021.
[29] Ibid.
[30] Private Companies now provide services to facilitate Space travel. This can be seen in Ventures like Virgin Galactic, which had its first flight with tourist on board in 2008. Simon Hattenstone, Joy Ride, The Guardian weekend, 11 November 2006 at 20.
[31] 'World's first hotel scheduled to open in 2027' CNN Atlanta, US 5 March 2021 <https://edition.cnn.com/travel/article/voyager-station.scn/index.html> accessed 20 October 2021.
[32] "Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (the "Outer Space Treaty", adopted by the General Assembly in its resolution 2222 (XXI)), opened for signature on 27 January 1967, entered into force on 10 October 1967

1979,[33] the Registration Convention 1976,[34] the Liability Convention 1972[35] and the Rescue Agreement 1968.[36]

By the provision of article VIII,

> *A State Party to the Treaty on whose registry an object launched into outer space is carried shall retain jurisdiction and control over such object, and over any personnel thereof, while in outer space or on a celestial body*. Ownership of objects launched into outer space, including objects landed or constructed on a celestial body, and of their component parts, is not affected by their presence in outer space or on a celestial body or by their return to the Earth. Such objects or component parts found beyond the limits of the State Party to the Treaty on whose registry they are carried shall be returned to that State Party, which shall, upon request, furnish identifying data prior to their return.[37] (Author's italics)

When issues of international relations are raised, states are regarded as actors and parties. It is the assent and consent of states that give life to relevant international treaties. Hence, an individual who finds him/herself in outer space is under the jurisdiction of the state of registry and not necessarily the state of nationality. This, in effect, gives credence to the provision of the Registration Convention, Art. II, which mandates that, 'when a space object is launched into earth orbit or beyond, the launching State shall register the space object by means of an entry in an appropriate registry which it shall maintain. Each launching State shall inform the Secretary-General of the United Nations of the establishment of such a registry.'[38] An inter-governmental organization is also deemed a State of registry under the Convention, especially when all its members are parties to the Treaty. Therefore, a state of registry that doubles as the launching state retains control and jurisdiction over persons that are in space via its space object. This provision is also reiterated in the Moon Treaty, hence: 'States Parties shall retain jurisdiction and control over their personnel, vehicles, equipment, facilities, stations and installations on the Moon. The ownership of space vehicles, equipment, facilities, stations and installations shall not be affected by their presence on the Moon'.[39]

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[33] The Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (the Moon Treaty)," adopted by the General Assembly in its Resolution 34/68), opened for signature on 18 December 1979, entered into force on 11 July 1984

[34] The Convention On Registration Of Objects Launched Into Outer Space (The Registration Convention)" adopted by the General Assembly in its Resolution 3235 (Xxix)), opened for signature on 14 January 1975 and entered into force on 15 September 1976

[35] The Convention on International Liability For Damage Caused By Space Objects (the Liability Convention" adopted by the General Assembly In Its Resolution 2777 (XXVI)) Opened For Signature On 29 March 1972, entered Into force On 1 September 1972

[36] The Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space (the "Rescue Agreement)", adopted by the General Assembly in its Resolution 2345 (XXII)), opened for signature on 22 April 1968, entered into force on 3 December 1968.

[37] Article I (C) 'The term State of registry" means a launching State on whose registry a space object is carried in accordance with Article II'

[38] In this Convention, with the exception of Article VIII to XII inclusive, references to States shall be deemed to apply to any international inter-governmental organization which conducts space activities if the organization declares its acceptance of the rights and obligations provided for in this Convention and if a majority of the States members of the organization are States Parties to this Convention and to the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies.

[39] Article 12(1).

The Rescue agreement is obvious evidence of communal cooperation amongst States and provides for the rescue and return of personnel of spacecraft and space object in distress to the launching state by any state that has information about the distress or accident. Upon such information reaching a state that a spacecraft landed prematurely, the state is required to render all necessary assistance to rescue and return the astronauts and the space object. Such a state is even encouraged to render such necessary assistance and to furnish details of expenses to the launching state for the purpose of reimbursement.[40]

The Liability Convention is particularly concerned about the damage caused by a space object. Accordingly, damage means loss of life, personal injury or other impairment of health; or loss of or damage to property of States or of persons, natural or juridical, or property of international intergovernmental organizations.'[41] It establishes regimes for compensation for both damage caused to property and persons, space objects and persons on board a space objects on the surface of the earth, and to aircraft and outer space.[42]

Interestingly, aside the Liability Convention, which covers damage to persons other than personnel of space activities, the other regimes do not deal with ordinary private individuals that may make their way to space as envisaged by this article. The only individuals identifiable under the Treaties are astronauts, space scientists and military personnel. Aside this, the space regimes do not envisage a situation where the suspect itself is an astronaut, space scientist or military personnel, hence the reason for the total absence of a regime on extradition from Outer Space. Hypothetically, A, an astronaut with a series of accomplished missions to space, murders his wife days before another mission, and puts her in a place where she may not be noticed until after he had left the earth. How will such a person be extradited? The answer to this may not be that simple where the suspect is not a national of the launching state, or while in space moves to the facility of another launching state where his duty is ordinarily assigned but got to space via the space object of another launching state. Assuming the US is the launching state and the suspect is a citizen of Nigeria, which state is expected to extradite in this situation? Returning to the provision of both the Outer Space Treaty and the Moon Treaty that provide that the launching state has jurisdiction over personnel, is the US expected to extradite the suspect to Nigeria? This is important as who bears the expenses for extradition as space travel/launch involves huge capital.

The International Space Station Agreement 1998 is worthy of assessment at this point. This defines the rights, control and jurisdiction of the owners of the station housing different elements where astronauts and scientist work and live while in space. Article 5(2) provides that, 'pursuant to Article VIII of the Outer Space Treaty and Article II of the Registration Convention, each partner shall retain jurisdiction and control over the elements it registers in accordance with paragraph 1 above and over personnel in or on the Space Station who are its nationals…'[43]

Simply, as is the case under the Outer Space Treaty, the Moon Treaty and the Registration Convention, each partner of the International Space Station (hereinafter referred to as 'ISS')

[40] If, owing to accident, distress, emergency or unintended landing, the personnel of a spacecraft land in territory under the jurisdiction of a Contracting Party, it shall immediately take all possible steps to rescue them and render them all necessary assistance. Article. 2.
[41] Article I(a).
[42] See Article II-IV.
[43] Agreement among the Government of Canada, Governments of Members States of the European Space Agency, the government of Japan, the government of Russian Federation and the government of United of America Concerning cooperation on the civil International space Station 1998. United Kingdom joined in 2012.

retains control and jurisdiction above and over their respective elements registered under the relevant registration regime and over their personnel who are their nationals**.** What then is the implication of an astronaut or personnel who is not a citizen of the ISS partner within the context of the hypothesis raised earlier? The possibility of non-national personnel being in space/ISS on a mission facilitated by a member state is not far-fetched. This situation is envisaged in the Agreement. Accordingly, members are mandated to ease the entry and residence of person who are citizens of another member (and the person's families into the territory of another member) and who is in that territory in order to carry out functions necessary for the implementation of the Agreement.[44] In this event, under whose control and jurisdiction is such a non-national personnel while in space, most especially for the purpose of extradition?

Notwithstanding the confusion embedded in the provision on control and jurisdiction over non-national personnel, and unlike the regimes discussed earlier, the ISS Agreement makes provision on extradition of personnel in space. The provision creates a regime on criminal jurisdiction to the effect that:

> where the act of a national of a member results in personal injury, safety or loss of life of a national of another member or where a misconduct happened in or on or causes damage to flight element of another member, the State, whose national commits the act shall join force with the affected state as regards their respective prosecutorial interest. Where after 90 days or within the agreed date of consultation between the two members, the injured state may assume criminal jurisdiction on the offender where the state of offender agrees to such jurisdiction or neglect to assure the other state of competent prosecution of the offender.[45]

This article is, however, more interested in Article 22(3),[46] which states that:

> If a Partner State which makes extradition conditional on the existence of a treaty receives a request for extradition from another Partner State with which it has no extradition treaty, it may at its option consider this Agreement as the legal basis for extradition in respect of the alleged misconduct on orbit. Extradition shall be subject to the procedural provisions and the other conditions of the law of the requested Partner State.

This provision is welcome as it provides for an extradition regime of suspects from space by contracting states. What is not clear is whether this is only applicable to States that make 'extradition conditional on the existence of a treaty'. Hence, a state without the condition cannot effectively request or oblige such a request under. Unfortunately, the provision on extradition is merely limited to member states and worse, it is *only* applicable where the act done is in orbit. The Agreement, just like other space regimes, do not provide for extradition of individuals in space who have committed a crime on earth and found their way to space and neither does it accommodate crimes committed on earth by personnel of ISS for the purpose of extradition back to the situs.

Domestic legislation on extradition from space

[44] See Article 18.
[45] See Article 22 (1-2).
[46] Ibid.

Domestic regimes on supervision of individual space activities can be found in laws such as the United States Special Maritime and Territorial Jurisdiction Legislation.[47] This is 'applicable to: all space vehicles in flight from the moment when all external doors are closed on earth following embarkation until the moment when one such door is opened on earth for disembarkation or in the case of a forced landing, and until the competent authorities take over the responsibility for the vehicle and for persons and property aboard.'[48] Further, Sweden's Swedish Act on Space Activities is "applicable to Swedish natural or juridical persons, even if not in the territory of Sweden,"[49] and the Finnish's Criminal Code is "applicable to any offence committed outside Finland where the severity for punishment of the act (regardless of the law of the place of commission), is based on an international agreement binding on Finland or on another statute or regulation internationally binding on Finland."[50]

Hence, the opportunities given to nationals[51] of States and International Organization to participate in outer space activities do not include appropriating the territory to itself, despite some authors asserting that the drafters of the Treaty did not intend to abolish States' exercise of jurisdiction in outer space totally and that such is the reason for this provision.[52] Arguments to substantiate this assertion include the question on how could a State be held internationally responsible for the activities of its governmental and non-governmental entities if it had no right to exercise both formal authority and effective control over them? This is supported by the fact that activities of non-governmental organisations in Outer Space must remain under the supervision of the appropriate State.[53] Again, State responsibility for individual space activities do not include that carried on the surface of the earth to which he has incurred liability because of a breach of contract. This could be applicable to individual manufacturers (involved in space commercial transactions) of a space object whose product has been held defective and held liable to pay compensation, or fulfill certain remedies either in tort or breach of warranty. This is because such liability and responsibility are not envisaged the Outer Space Treaties. The domestic law would adequately cover this aspect.

The UK extradition rules are governed by the Extradition Act 2003, the country's extradition arrangements designated into category 1 or Category 2 depending on the territory. Category 1 deals with member states of the European Union and Gibraltar (British Overseas Territories),[54] while others[55] are under Category 2.[56] So far, the UK has made several

[47] United States Constitution. Article VII.
[48] Ibid, S.7 [6] 2006.
[49] See Section 2 & 5 Swedish Act on Space Activities 1982.
[50] Section 7 Chapter 1 of the Finish Criminal Code
[51] Dennis Tito was the first Tourist to visit Outer Space (in 2001) as a guest of the Russian Government; therefore, he was significantly under the government control. Thomas-Rankin R, "Space Tourism Fanny Pack, Ugly T-Shirts and the Law in Outer Space" (2003)36. 695. Suffolk University Law Review Journal
[52] Stephen G, 'Developments in Space Law: Issues and Policies (Netherlands. Martinus Nijhoff Publishers, 1991), 24
[53] Ibid.
[54] Part 1, Extradition Act 2003. It should be noted that since the UK pulled out of EU, Extradition or surrender between it and EU is now governed by EU-UK Trade and Cooperation Agreement 2021. Anand Doobay. 'Extradition: United Kingdom-England & Wales' 26 May 2021 <http://globalinvestigationsreview.com/insight/know-how/extradition/report/united-kingdom> accessed 27 October 2021
[55] Approximately 92 countries including Nigeria, Turkey, Macedonia, Sri Lanka, Canada, Cuba, Fiji, Ghana, South Africa, U.S etc.
[56] Part 2 Extradition Act 2003.

bilateral extradition arrangement with many countries such as the US,[57] Philippines,[58]Algeria,[59] and Brazil.[60] Unlike the UK, with substantive domestic law on extradition interplaying with relevant bilateral and multilateral treaties, extradition to and from US is also a function of treaties between it and the intending country or countries.[61]Nigeria, like the UK, has her extradition Act of 1966 playing along with extradition treaties. To this end several extradition requests have been made under these two regimes on extradition from Nigeria, as exemplified in several cases such as *George Udeozor v Federal Republic of Nigeria;*[62] *Kashamu Buruji v A.G. FRN,*[63] and *Emmanuel Okoyomon, former Managing Director* and *Chief officer of the Nigerian Security Printing and Minting Company (NSPM) v A.G. FRN.*[64]

Looking at the trend of extradition treaties, it is clear that it is intended that extradition of suspect is to be from one country or sovereign nation to another. Hence, climes like outer space do not fall within domestic extradition discuss.

Conclusions and recommendations

It is safe to state at this point that the world community has let its guard down by not realising or thinking that Outer Space may or can be a safe haven for suspects or criminals in a bid to escape the hands of the law upon the commission of an offence. This has led to the inertia on this possibility, thereby resulting in the absence of laws or procedure for (a) the prevention of an escape to outer space; and (b) extradition from space for the commission of offences committed on the earth. That Outer Space is or would be habitable for humans shows that technology never ceases to amaze us. Hence, there is the need to put effective regimes on extradition of suspects from outer space into force, i.e. a Space Extradition Treaty. This regime must be informed by different pointers in order to cater for many lacunas. As space commercialisation becomes realistic, there is the need to put in place an effective investigative regime to check on the criminal records of intending space farers before they embark on the journey. This can be achieved by checking with the authorities of the states of the travelers to ascertain if the suspect is not on the wanted list, in a pending matter before the court, or has another issue with the authority and thus not expected to leave the country.

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[57] Extradition treaties between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America. Entered into force 26 April 2007.
[58] Extradition treaty between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Philippines. Entered into force 26 April 2007.
[59] Convention between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of People's Democratic Republic of Algeria on Extradition 2006.
[60] Treaty between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Federative Republic of Brazil on mutual Legal assistance in Criminal Matters 2005.
[61] An example is the US-Nigeria Extradition Treaty of 22 December 1931 signed by the UK while Nigeria was a protectorate. The Treaty has been ratified in subsequent laws such as the Extradition Act 1966, the Extradition Modification Order, 2014 and the Extradition Act (Proceedings) Rules, 2015. <http://www.mondaq.com/nigeria/white-collar-crime-anti-corruption-fraud-/1138858/a-look-at-the-law-of-extradition-in-nigeria-vis-a-vis-buruji-kashamu-and- the-possible-implications-for-dcp-abba-kyari> accessed 27 Jan 2022.
[62] [2007] LCN/2249 (CA).
[63] [2009] 3 PLR/65, CA/L/688/2011, CA/1030/2015, CA/1030A/2015.
[64] [2014] FHC/CS/670, 'Cases and Materials on Extradition in Nigeria', United Nations Office on Drugs and Crimes, Country Office, Nigeria, United Nations Abuja 2016 <http://unodc.org/documents/nigeria/publications/Anti-Corruption=Projet-Nigeria/Cases_and-_Materials_on_Extradition_in_Nigeria.pdf> accessed 27 Jan 2022.

Another issue is who is to be responsible for the extradition. It is easier to request for extradition, since knowing the actual station or place where the suspect is not usually a problem. The problem would be in carrying out the request. On whose account is the cost of extradition going to be? Worse, if the station or mission were sponsored by many states, which state would be responsible? There is also the need to ascertain responsibility and liability between the launching state and state of registry for the purpose of the extradition. The Space extradition regime should determine the state that would be responsible for extradition, the state that bears the cost of extradition, and the state that would be liable for any damage caused during the course of extradition. I addition, it should specify the state that would receive the suspect, whether astronaut or not, and the modalities for the onward movement of the suspect to the requesting state. There is also the need to determine the type of acts that may warrant a person being extradited from outer space. This would limit an extradition request by forestalling or preventing any arbitrary request. State partners to an ISS Agreement should also amend Article 5 of the agreement to accommodate extradition of astronauts for crimes committed on earth. Limiting the extradition requests for crimes committed on orbit is inadequate. A time will come that a space region would need an effective policing system such as Interpol to further implement and administer space extradition regimes. This article further recommends that state parties to the Outer Space Treaty be encouraged to adopt regimes on extradition of individuals from space, since space belongs to everyone and must be opened to enter into bilateral or multilateral relationship with other states in respect of space extradition.

Forced labour and labour exploitation: the scope of modern slavery practices and the European Court of Human Rights

Dr. Konstantina Michopoulou*

Introduction

For centuries, labour offered involuntarily under the threat of violence or under regimes, favouring slavery or servitude was as indication of a conflict of social classes and an oppression of vulnerable people. In modern 'democratised' societies, the problem remains having taken on various subtle forms that constitute modern practices of slavery and servitude. A closer examination of the international legal texts prohibiting such phenomena provided in this article attempts to interpret "forced labour" and "labour exploitation" and defines the conceptual boundaries, taking into consideration recent developments in European case law. Its aim is to offer an appropriate background for the detection and confrontation of "modern slavery practices".

The international legal framework on forced labour and labour exploitation

Under Article 2 § 1 of the 1930 International Labour Organization (ILO) Convention concerning Forced or Compulsory Labour (Convention No. 29), the term forced or compulsory labour means all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered him/herself voluntarily. In addition, the 2014 Protocol to the Forced Labour Convention 1930 (ILO Forced Labour Protocol), adopted by the International Labour Conference in 2014,[1] and entering into force on 9 November 2016, deletes the transitional provisions of Article 1, paragraphs 2 and 3, while Articles 3 to 24 of the Convention, complete it.

The ILO's definition of forced labour comprises two basic elements: the work or service is exacted under the menace of a penalty; and it is undertaken involuntarily. Clarifying both elements, the penalty does not need to be in the form of penal sanctions, but may also take the form of a loss of rights and privileges, and the menace of a penalty could take many different forms. Of course, its most extreme form involves physical violence or restraint, or even death threats addressed to the victim or relatives. However, subtler forms of menace may be noticed, sometimes of a psychological nature, including, as ILO has reported, threats to expose victims to the police or immigration authorities when they are occupied illegally, or in the case of girls forced to prostitute themselves in distant cities, denunciation to village elders. In addition, penalties can include economic penalties linked to debts or other of financial nature. Sometimes employers may require workers to deliver their identity papers, using the threat of confiscation of these documents to exact forced labour.[2]

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[1] Available at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:P029

[2] International Labour Office, "The cost of coercion. Global Report on forced labour under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work", *International Labour Conference, 98th*

With regard to the concept of voluntary offer, ILO supervisory bodies have touched on a range of aspects including the form and subject matter of consent, the role of external constraints or indirect coercion, and the possibility of revoking freely given consent. It is noticed that in many cases victims entering forced labour situations do so through fraud and deception, and later discover that they are not free to withdraw their labour, owing to legal, physical or psychological coercion. For this reason, initial consent may be considered irrelevant when deception or fraud has been used to obtain it.[3]

In addition, Article 3(a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially the Women and Children ("the Palermo Protocol")[4] -supplementing the United Nations Convention against Transnational Organised Crime - provides for the definition of Trafficking in persons:

> The recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of human organs.

Similar provisions and structure are common to other major international legal instruments when defining human trafficking. First, they describe the "act" of the perpetrator; secondly, the "means" which are used to serve the "act"; and, thirdly, the "purpose of exploitation". In particular, Article 4 of the Council of Europe Convention on Action against Trafficking in Human Beings[5] provides, firstly, in subparagraph (a), the definition of "trafficking in human beings". This includes the triptych of act-means-purpose, and, in subparagraph (b), underlines that the consent of a victim of trafficking in human beings shall be irrelevant where any of the means set forth in sub-paragraph (a) have been used.

The explanatory report accompanying the Anti-Trafficking Convention emphasises that trafficking in human beings is a major problem in Europe today, threatening the fundamental rights and values of democratic societies. In brief, it is considered to be: "the modern form of the old worldwide slave trade". According to the explanatory report, the term "abuse of a position of vulnerability" must be perceived as the abuse of any situation in which the person concerned has no other real and acceptable choice than to surrender. The "vulnerability' may be due to any kind of weakness, whether physical, mental, emotional, family, social or economic. In fact, a vulnerable position may include a precarious or illegal administrative situation, a state of economic dependence, inhuman living conditions, lack of ties with the state of residence, or fear of deportation or a fragile health condition. Consequently, a "vulnerable position" is considered any risk situation or state of weakness that may lead to a human being having no other choice but to surrender

Session 2009, Geneva, paragraph 24, Available at: https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_106268.pdf

[3] International Labour Office, note 2, paragraph 25.

[4] The Protocol was adopted in Palermo, Italy in November 2000, available at: https://www.ohchr.org/EN/ProfessionalInterest/Pages/ProtocolTraffickingInPersons.aspx

[5] Signed in Warsaw, on 16th/5/2015, available at: https://www.lastradainternational.org/wp-content/uploads/2020/10/Council-of-Europe-Convention-on-Action-against-Trafficking-in-Human-Being.pdf

to the perpetrator's "sphere of authority" and thus accept the exploitation. The "abuse" of a vulnerable situation with the purpose of exploitation constitutes a violation of human rights and an intrusion on human dignity, integrity, and personal freedom.

According to the generally accepted definition, within the sense of "trafficking of human beings" (THB) include forms of exploitation such as sexual exploitation, labour exploitation or other practices of modern slavery. However, the integral difference between slavery or servitude and human trafficking is that in the case of THB the "sphere of authority" that a victim of trafficking is submitted to amounts neither to complete enslavement (as in slavery) nor to a total deprivation of liberty of the victim (as in servitude). Rather, it is a "breakage of a victim's personal liberty" that leads to his voluntary submission as an object of exploitation by the perpetrator.[6]

Moreover, THB is broader when compared to labour exploitation, with the latter been one of the forms of exploitation covered by the THB's definitions. This highlights the intrinsic relationship between forced or compulsory labour and human trafficking.[7] When dealing with labour exploitation and forced labour, forms of psychological threat as a means of coercion that serve the act of THB, may include complaints to the police or immigration services, the refusal to pay wages or, generally, the exploitation of the vulnerable position of the worker, due to an illegal employment regime intensified by inhuman living conditions. These means may include any act of violation of labour or insurance legislation, regarding e.g., the timetable, the mandated minimum wages, the working conditions, the employers' insurance and their the declaration to labour authorities, overtime payments, health and safety conditions etc., pursued by the employer and capable of bringing pecuniary gain or any financial benefit to the employer.[8] In this sense, when the employer exploits and controls workers by taking advantage of their status as illegal immigrants and, therefore, by their weakness, when the surveillance is done in situ, when working hours are long, when wages are low or are not properly paid, when there are threats of violence in the event of failure to cooperate with the conditions submitted, then the work becomes compulsory.[9]

Within the sphere of the Council of Europe, although the European Convention on Human Rights (ECHR)[10] does not provide explicitly for a prohibition of THB, Article 4(2) prohibits forced labour (without defining it), reading as follows: No one shall be required to perform forced or compulsory labour". In a landmark case, the European Court of Human Rights (ECtHR) attempted an interpretation of Article 4(2) of the ECHR.[11] This was based on the provisions of ratified international legal texts, such as Convention No. 29 of the ILO, the Palermo Protocol and the Council of Europe Anti-Trafficking Convention, which safeguard fundamental rights in labour and prohibit the

[6] As this phrase adopted by the Penal Plenary of the Greek Court of Cassation in its Decision of 18th of June 2019, No 2/2019, which was published after the public prosecutor lodged an appeal on points of law after Greece's conviction by ECtHR for misapplication of the legislation on Labour Trafficking.
[7] See also paragraphs 85-86 and 89-90 of the Explanatory Report accompanying the Anti-Trafficking Convention
[8] Michopoulou, K. "The protection of labour rights in the agricultural sector after the 'Manolada cases' and the role of Labour Inspectorate in the application of the Employers' Sanctions Directive", *ILO, PICUM, ETUC's Legal Seminars on "Criminal law approaches to exploitative working conditions",* 20th October 2021
[9] As analyzed in the Intervention Anti-Slavery International report in the ECHR case, *Chowdury and Others v. Greece,* judgment of 30.3.2017, at 84, available at: https://hudoc.echr.coe.int/eng?i=001-172701
[10] Available at: https://www.echr.coe.int/Documents/Convention_ENG.pdf
[11] *Chowdury and Others v. Greece*, note 9

forced labour and labour exploitation. The Court thus reiterated that human trafficking fell within the scope of Article 4 ECHR and that exploitation through labour is one aspect of trafficking in human beings. In addition, the ECtHR underlined that the prohibition provided in Article 4(2) of the Convention is not aimed at situations of total vulnerability of the victims, or the deprivation of liberty or exclusion from the outside world. As such, restriction of freedom of movement is not a prerequisite for a situation to be characterised as forced labour or even human trafficking.[12] This is because freedom of movement relates not to the provision of work itself, but rather to a situation of servitude which is prohibited by the first paragraph of Article 4.

Regarding the state's obligations as stemming from Article 4(2), the ECtHR held that these are not confined merely to the direct actions of the State authorities, ruling that the triptych of positive obligations includes:

> (1) the prevention of trafficking by informing vulnerable groups about their rights and how they are claimed, including adequately training all relevant actors in cooperation with relevant anti-trafficking bodies; (2) the protection of victims by taking measures to protect the actual or potential victims of trafficking in human beings;[13] and (3) on a repressive level, the punishment of perpetrators.[14]

Consequently, the general legal framework of a State's positive obligations as derived by the ECHR positively obliges a State to take further action at national level, not only legislating as general law, but also, in addition, issuing Ministerial Decisions, Joint Ministerial Decisions, and regulatory Circulars etc.[15]

The pathogenesis of European agricultural sector and ECtHR's case law on labour trafficking: *the decision in Chowdhury*

Over the last decade, the system of agricultural operating mechanisms of production in Southern Europe has been based on the existence of rudimentary housing for workers - third-countries nationals hired to support the needs of agricultural productivity. During the harvest period, in the biggest agricultural areas, i.e. New Manolada in Western Greece, Foggia and Caserta in Southern Italy and Huelva in Southwestern Spain, numerous seasonal workers are employed to cover the needs of the agricultural sector.[16]

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[12] *Chowdury and others*, note 9, at 123

[13] This is in order to identify the conditions that constitute exploitation in the workplace and thus to identify the victims according to Article 4, and the right of victims to be compensated by the perpetrators of crime, along with measures to set up a compensation fund for victims.

[14] *Chowdury and others*, note 9, at 93, 99, 104, and 128.

[15] Michopoulou, K. (2017), *Positive Obligations of State Institutions. The case law of the European Court of Human Rights and the Greek Constitution*, Doctoral Thesis, Panteion University of Social and Political Sciences, Athens, 95-103, available at: https://www.didaktorika.gr/eadd/handle/10442/40614?locale=en

[16] OHCHR, Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo - Addendum - Mission to Italy, at 7, Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/128/13/PDF/G1412813.pdf?OpenElement; D' Agostino L., "'Ghettos' and gang masters: How migrants are exploited in Italy's tomato fields", Available at: https://edition.cnn.com/2017/12/07/europe/italy-migrant-camp-exploitation/index.html; *Chowdury and Others v. Greece*, note 9; Manolada Watch, Report on the situation at Manolada - January 2019, Available at: https://g2red.org/report-on-the-situation-at-manolada-january-2019/; Augère-Granier M-L., Members' Research Service PE 689.347, "Migrant seasonal workers in the European agricultural sector", *European Parliamentary Research Service (EPRS)*, European Union, February 2021, Available at: https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/689347/EPRS_BRI(2021)689347_EN.pdf

In this sector, undeclared work is more prevalent compared to other sectors of the EU economy in general. However, its magnitude is difficult to measure. It is estimated that more than half of the EU agricultural labour force would be engaged in informal employment. For example, in Italy between 450,000 and 500,000 migrants work in the agricultural sector and it is estimated that 40 per cent of them are irregular workers.[17] Similarly, in West Peloponnese, Greece, during the harvest period the migrant workers may reach 8000, in total, with only around 4 per cent of them been occupied regularly. As such, these workers have no access to social security and other social rights in the country they are working. In most of these cases, their origin from poor countries along with their illiteracy is a deterrent factor to even being aware of their rights. The temporary residence for land workers is usually situated in isolated rural areas, in shantytowns or makeshift camps with containers or rudimentary shelters next to the main town under the tolerance of the authorities. The camp site selected to serve the needs of carrying out seasonal agricultural work, usually in a land not owned by the employer, results in the diminishment of any liability for such degrading living conditions. Consequently, their vulnerability makes them potential victims of exploitation by intermediaries and employers.[18]

In 2015, a case that revealed these problematic phenomena in the agricultural sector, occupied the ECtHR,[19] called to diagnose "labour trafficking" through the prism of the prohibition of forced labour under the second paragraph of article 4 ECHR. The case took place in New Manolada, Western Peloponnese, and Southern Greece, and concerned 42 Bangladeshi nationals (applicants to ECtHR) who did not have work permits when they were recruited between October 2012 and February 2013. Those applicants were living in makeshift huts without toilets or running water. Their employers had recruited them to pick strawberries on a neighbouring farm but failed to pay them wages and obliged them to work every day from 7 a.m. to 7 p.m., in difficult physical conditions and under the supervision of armed guards. They had been promised a wage of 22 euros for seven hours' work and three euros for each hour of overtime. Their employers had warned them that they would only receive their wages if they continued to work. Between February and April 2013, the workers went on strike demanding payment of their unpaid wages, but without success. On 17 April 2013, the employers replaced them with other Bangladeshi migrants. Fearing that they would not be paid; 100 to 150 workers from the 2012-2013 season started approaching the two employers to demand their wages. One of the armed guards then opened fire, seriously injuring 21 of them. The wounded were taken to hospital and were subsequently questioned by the police. The two employers, together with the guard who had opened fire and an armed overseer, were arrested and tried for attempted murder – subsequently reclassified as grievous bodily harm, as well as for trafficking in human beings.

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[17] Augère-Granier M-L., note 16.

[18] Jones T. and Awokoya A., "Are your tinned tomatoes picked by slave labour? How the Italian mafia makes millions by exploiting migrants", Available at: https://www.theguardian.com/world/2019/jun/20/tomatoes-italy-mafia-migrant-labour-modern-slavery Malichudis S., "Thousands of agricultural workers in Manolada are "staying home" – in shacks", Available at: https://wearesolomon.com/mag/on-the-move/thousands-of-agricultural-workers-in-manolada-are-staying-home-in-shacks/

[19] *Chowdury and Others v. Greece*, note 9; ranked among European Court of Human Rights (ECtHR)'s 30 cases with the greatest impact: https://www.coe.int/en/web/portal/-/30-new-cases-highlight-the-impact-of-the-european-convention-on-human-rights?fbclid=IwAR04430RTFaPqV0tuqoSNj-TNnKrR44Ca5OdZ8a67kda7AeHSwDDUBkkVXU

The public prosecutor asserted that the incident of 17 April 2013 was indicative of a situation of over-exploitation and barbarism to which the large landowners in the region had subjected migrant workers, arguing that this incident referred to images of a "Southern Slave" having no place in Greece. However, by its judgment of 30 July 2014, the Assize Court acquitted the accused of the charge of trafficking in human beings, stating that the victims had not been in a state of absolute weakness. Consequently, it convicted the armed guard and one of the employers only of grievous bodily harm and unlawful use of firearms; their prison sentences were commuted to a financial penalty.[20] On 21 October 2014, the workers asked the public prosecutor at the Court of Cassation to appeal against the assize court judgment, arguing that the charge of human trafficking had not been examined properly. That request was dismissed and the part of the assize court judgment dealing with human trafficking became "irrevocable", thus satisfying the prerequisite of the exhaustion of local remedies to file an application before the ECtHR under Article 35 ECHR.

The workers, victims of labour trafficking; relying on Article 4(2) alleged before the ECtHR that the authorities had failed to react. They further submitted that the State was under an obligation to prevent them from being subjected to human trafficking, to adopt preventive measures for that purpose and to punish the employers. In 2017, the ECtHR accepted their application holding that the State had essentially complied with the positive obligation to establish a legislative framework for combating trafficking in human beings.[21] Nevertheless, it had failed in its obligation to prevent the situation of human trafficking and to protect the victims, to conduct an effective investigation into the offences committed, and to punish those responsible for the trafficking.[22]

The ECtHR observed that the applicants did not have a residence permit or a work permit and could neither live elsewhere in Greece nor leave the country. In addition, they were aware that their irregular situation put them at risk of being arrested and detained with a view to their removal from Greece. An attempt to leave their work would no doubt have made this more likely and would have meant the loss of any hope of receiving the wages due to them, even in part.[23] Undoubtedly, this situation rendered them to a position of vulnerability[24]. Thus, the Court concluded that where an employer abuses his power or takes advantage of the vulnerability of his workers, in order to exploit them, then they do not offer themselves for work voluntarily; and the prior consent of the victim is not sufficient to exclude the characterisation of work as 'forced labour'.[25]

Even assuming that, at the time of hiring, the applicants volunteered their work and believed in good faith that they would receive their wages, the situation subsequently changed when the applicants realized that if they stopped working, they would never collect the arrears of their wages.[26] As such, the question whether an individual offers himself for work voluntarily is a factual question that must be examined *ad hoc*, in the

[20] They were also ordered to pay 1,500 euros to the 35 workers who had been recognised as victims – that is, 43 euros to each of them.
[21] *Chowdury and Others*, note 9, at 109.
[22] *Chowdury and Others*, note 9, at 128, 134.
[23] *Chowdury and Others*, note 9, at 95.
[24] *Chowdury and Others*, note 9, at 97.
[25] *Chowdury and Others*, note 9, at 96.
[26] *Chowdury and Others*, note 9, at 97.

light of all the relevant circumstances of a case.[27] Consequently, the ECtHR found a violation of Article 4(2) of the ECHR. Specifically, the ECtHR took issue with the domestic court's ruling that the applicants' working and living conditions did not lead them to live in a state of exclusion from the outside world without the possibility of abandoning that employment relationship and seeking other employment. That court had interpreted and applied the concept of trafficking in human beings (or forced labour as a form of exploitation for the purpose of trafficking) in a very restrictive manner, by identifying it with servitude, while the seasonal workers' labour conditions corresponded to labour trafficking and not to servitude that amounts to a permanent ("immutable") condition.[28]

Conclusions

Compared to the large scale of irregular employment in the agricultural sector, which in many cases reaches the edges of labour trafficking, there have been very limited cases of THB for the purpose of labour exploitation detected by labour inspectors and then brought to justice. The role of the labour inspectorate for the detection of victims of labour exploitation is unquestionable, but the deficit in labour inspection in both working and living places remains a major problem. The ILO Convention No. 129 (1969) concerning Labour Inspection in Agriculture prescribes and clarifies the role and competences of Labour Inspectorate Bodies in this sector, highlighting the importance of effective inspections necessary to secure compliance with the legal provisions relating to conditions of work, life, health, or safety of workers.

Although C-129 ILO Convention entered into force in 1972, it has still not been ratified by many developed countries,[29] including the USA, the UK, Ireland, Israel, Japan, South Africa, Greece and Turkey. However, in addition to a legal framework at national and international level against labour trafficking, combating labour trafficking phenomena should be included in public policy. Towards this direction, there is a move towards the adoption of implementation measures, such as administrative actions or circulars to enhance the role of inspectorate bodies and set up specialised prosecutors' offices capable of adopting proactive methods of identifying victims. In parallel, the co-operation of various stakeholders, such as strengthening the role of trade unions, will create a stronger shield for the fight against THB.

In summary, as the European economy is dependent on the agricultural sector, enhancing integrity in agriculture will lead to a more transparent European supply chain, which in turn will respect the fundamental values of a democratic society and promote socio-economic sustainability within Europe.

[27] *Chowdury and Others*, note 9, at 101, affirmed in *Zoletic and Others vs Azerbaijan*, Application no 20116/12, Judgement of 7.10.2021, at 157, available at: https://hudoc.echr.coe.int/fre?i=001-212040
[28] *Chowdury and Others*, note 9, at 99, 100.
[29] The list of countries that have not ratified yet the C-129 ILO Convention available at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11310:0::NO:11310:P11310_INSTRUMENT_ID:312274:NO

EU´s and UK´s General Schemes of Preferences after Brexit – possible consequences for developing countries

Leonie Zappel*

Introduction

After the UK´s withdrawal from the EU on 31 January 2020,[1] the UK had the opportunity to establish its own GSP scheme for developing countries.[2] The need for further market access of developing countries to the UK market led to the fact that the UK has copied the body of EU's GSP scheme, which was in force at the time of the UK's withdrawal from the EU.[3] The UK's own GSP scheme is in force since the 1 January 2021.[4]

Experts said that the UK had simply rolled over EU´s GSP scheme, especially to maintain continuity of the market access for developing countries.[5] Consequently, there should be no changes to and no problems for developing countries with the implementation of UK´s GSP scheme post-Brexit. At first sight, this is true, but in some cases, Brexit had significantly more profound effects than most experts had suspected at the outset. This article asks whether there are truly no changes for developing countries in accessing the UK as well as the EU market under the GSP schemes after Brexit. Furthermore, it examines the impairment caused for developing countries regarding the access to UK as well as EU´s markets under the different GSP schemes.

To address that question, the author examines different legal sources and publications. First, she analyzes the EU´s und UK´s provisions on the GSP, especially on the so-called graduation and market access. Additionally, the author evaluates different papers on the impact of the different GSP schemes for developing countries after Brexit. In addition, an outlook on EU's GSP scheme as of 2024 is provided, including an estimate of how grave the divergences between the two GSP schemes might be in the near future.

The main characteristics of EU´s and UK´s GSP schemes

For a better understanding of the differences between EU´s and UK´s GSP schemes, the main characteristics of EU´s GSP scheme, which mainly apply for UK´s GSP scheme, are

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[1] European Union, *Brexit: EU-UK relationship*, available at: <https://eur-lex.europa.eu/content/news/Brexit-UK-withdrawal-from-the-eu.html?locale=en#> accessed 10 January 2022.

[2] Government UK, *Guidance – Trading with developing nations*, available at: <www.gov.uk/government/publications/trading-with-developing-nations> accessed 10 January 2022.

[3] Mattia Di Ubald, *A Post-Brexit Generalized System of Preferences for the UK: How to Guarantee unchanged market access for developing countries?* (2019) UK Trade Observatory, Briefing Paper 32, 2; Government UK, *Guidance – Trading with developing nations*, available at: <www.gov.uk/government/publications/trading-with-developing-nations> accessed 10 January 2022.

[4] Department for International Trade, *Information Pack on the UK´s Generalised Scheme of Preferences*, UK 2021, 4.

[5] Mattia Di Ubald, *A Post-Brexit Generalized System of Preferences for the UK: How to Guarantee unchanged market access for developing countries?* (2019) UK Trade Observatory, Briefing Paper 32, 2; Government UK, *Guidance – Trading with developing nations*, available at: <www.gov.uk/government/publications/trading-with-developing-nations> accessed 10 January 2022.

to be explained. The EU has been granting unilateral trade preferences to developing countries since 1971.[6] With the accession of the UK to the EU in 1973,[7] the UK also applied unilateral preferences to developing countries until its withdrawal from the EU under EU´s GSP scheme. To enable developing countries to get an almost identical market access, the UK adopted the Trade Preference Scheme (EU Exit) Regulations 2020.[8] Within the EU, the currently applicable legal basis for this unilateral granting of preferences is Regulation (EU) No. 978/2012 (GSP Regulation).[9] EU´s and UK´s GSP schemes are embedded in the globally applied Generalized System of Preferences (GSP). Within this framework, industrialized nations grant tariff preferences to goods originating in developing countries.[10] The main objective of the GSP scheme is to support the export of goods originating from developing countries. By eliminating tariffs, these countries can offer their goods on the import market at lower prices and achieve higher export revenues. These measures are intended to reduce poverty and promote industrialisation in developing countries, resulting in overall economic growth.[11]

As a founding member of the WTO, the UK will continue to be a WTO member after its separation from the EU, thus WTO law continues to apply.[12] Under WTO law, it is possible to grant tariff preferences to developing countries, to exclude further developed and developing countries from benefits in total or in part, and to grant additional benefits to least developed countries as exemption from the Most-Favoured-Nation obligation of Article I GATT 1994.[13] Under WTO Law, differentiation based on economic needs is legitimate if it is ensured that developing countries with comparable economic situations are treated equally.[14] This results in a fixed structure within the current GSP regulation, as in previous regulations. The GSP scheme consists of one general arrangement and two special arrangements.[15] The UK´s GSP scheme refers to them as frameworks.[16]

The general arrangement (Art. 4 - 8 Regulation (EU) No. 978/2012) or framework (Art. 7, the Trade Preference Scheme Regulations 2020) applies to all GSP beneficiary countries.[17]. Beneficiary countries include all eligible countries that are not classified by the World Bank

[6] Preamble No. 1 to the Regulation (EU) No. 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalized tariff preferences and repealing Council Regulation (EC) No. 732/2008 [2012] OJ L303/1.
[7] Treaty of Accession of Denmark, Ireland and the United Kingdom [1972] OJ L73/1; Treaty of Accession of Denmark, Ireland and the United Kingdom, Adaptation decision [1973] OJ L2/1.
[8] The Trade Preference Scheme (EU Exit) 2020 No. 1438 of 15 December 2020.
[9] Regulation (EU) No. 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalized tariff preferences and repealing Council Regulation (EC) No. 732/2008 [2012] OJ L303/1.
[10] Gene M. Grossmann and Alan O. Sykes, in George A. Bermann and Petros C. Mavroidis, *WTO Law and Developing Countries* (2007), 255, 257.
[11] Achim Rogmann, in Hans-Michael Wolffgang, Achim Rogmann, and Georg Pietsch, *Kommentar für das gesamte Außenwirtschaftsrecht (AWR-Kommentar*), Einführung zur APS-VO, para. 30; Leonie Zappel, ´50 Jahre APS der EU – Ein Anreiz für nachhaltige Entwicklung?` Part 2 (2021), 12, AW-Prax, 638.
[12] Martín Molinuevo, ´Brexit: Trade Governance and Legal Implications for Third Countries` (2018), Vol. 52, Issue 4, Journal of World Trade, 608.
[13] Achim Rogmann, in Hans-Michael Wolffgang, Achim Rogmann and Georg Pietsch, *Kommentar für das gesamte Außenwirtschaftsrecht (AWR-Kommentar*), Einführung zur APS-VO, para. 32.
[14] WTO-Appellate Body, Report of 7.4.2004, WT/DS246/AB/R – EC – Tariff Preferences, para. 142 ff.
[15] Leonie Zappel, ´50 Jahre APS der EU – Ein Anreiz für nachhaltige Entwicklung?` Part 2 (2021), 12, AW-Prax, 638.
[16] Government UK, *Guidance – Trading with developing nations*, available at: <www.gov.uk/government/publications/trading-with-developing-nations> accessed 10 January 2022.
[17] Achim Rogmann, in Hans-Michael Wolffgang, Achim Rogmann and Georg Pietsch, *Kommentar für das gesamte Außenwirtschaftsrecht (AWR-Kommentar*), Art. 1 APS-VO, para. 8.

as high-income or upper-middle income countries during three consecutive years, or do not benefit from a preferential market access arrangement that provides the same tariff preferences as the scheme (or better), for substantially all trade with the EU/UK. Imports from these countries benefit from reduced rates of import duty on certain goods outlined in the GSP scheme.[18]

Additionally, the GSP scheme provides a special arrangement (Art. 9 - 16 Regulation (EU) No. 978/2012) or enhanced framework (Art. 8 the Trade Preference Scheme Regulations 2020) for those countries that are particularly promoting sustainable development and good governance. The classification with a GSP+ (EF) status depends on ratification and compliance with, currently, 27 international agreements, which require, for example, human rights protection and good governance.[19] In principle, any developing country whose imports are less than 2 per cent of imports of all GSP beneficiaries, and whose seven major export products comprise at least 75 per cent of that country's total exports, may apply to receive GSP+ benefits.[20] The third framework is called the LDC or EBA framework. This framework comprises countries that the UN classifies as Least Developed Countries (Art. 17 - 18 Regulation (EU) No. 978/2012 and Art. 6 of the Trade Preference Scheme Regulations 2020). Imports of goods other than arms and ammunition (Everything but Arms – EBA) originating from these countries have a quota-free access and are free of import duty.[21]

Due to the graduation mechanisms, developing countries or individual groups of goods can be excluded from preferential market access. Graduation means removing those countries and sectors from the GSP preferences that are no longer considered in need of preferential treatment.[22] There are two graduation mechanisms in the EU´s und UK´s GSP. Within the country graduation GSP, beneficiaries graduate from the GSP if the World Bank classifies them as high- or upper-middle income countries consecutively for three year or if they sign a trade agreement with the EU that provides the same or better tariff preferences as those under the GSP (Art. 4 Regulation (EU) No. 978/2012). The second alternative is incorporated in Article 9 of the Trade Preference Scheme (EU Exit) Regulations 2020. Within the country-section graduation, the GSP preferences are withdrawn in specific product sections if a country's share of EU GSP imports in that section exceeds a certain threshold (per cent age of GSP imports) for three consecutive years (Art. 8 para. 1 Regulation (EU) No. 978/2012). The UK has adopted this graduation mechanism (Article 22 the Trade Preference Scheme (EU Exit) Regulations 2020).[23] The exact thresholds are defined in the GSP schemes. In general, violations of the condition for granting preferences

[18] Government UK, *Guidance – Trading with developing nations*, available at: <www.gov.uk/government/publications/trading-with-developing-nations> accessed 10 January 2022.
[19] Martín Molinuevo, ´Brexit: Trade Governance and Legal Implications for Third Countries` (2018), Vol. 52, Issue 4, Journal of World Trade, 608; Achim Rogmann in Hans-Michael Wolffgang, Achim Rogmann and Georg Pietsch, *Kommentar für das gesamte Außenwirtschaftsrecht (AWR-Kommentar*), Art. 1 APS-VO, para. 9.
[20] Achim Rogmann, in Hans-Michael Wolffgang, Achim Rogmann and Georg Pietsch, *Kommentar für das gesamte Außenwirtschaftsrecht (AWR-Kommentar*), Einführung zur APS-VO, para. 33.
[21] Government UK, *Guidance – Trading with developing nations*, available at: <www.gov.uk/government/publications/trading-with-developing-nations> accessed 10 January 2022.
[22] European Commission, The EU´s new Generalised Scheme of Preferences (GSP), tradoc 150164, 9 f.
[23] Government UK, *Guidance – Trading with developing nations*, available at: <www.gov.uk/government/publications/trading-with-developing-nations> accessed 10 January 2022.

may be sanctioned by a withdrawal of preferences. Similarly, temporary withdrawal of tariff preferences is possible in case of fraud, irregularities and non-compliance.[24]

The problems of rolling over the EU GSP into the UK GSP

In order to identify the problems for developing countries, the differences in the legal frameworks will be considered first. The list of the current GSP beneficiary countries, under Schedule 1 Part 1 of the UK Trade Preference Scheme and Annex II Regulation (EU) 978/2012, differ significantly. Only some beneficiary countries on the list for preferences under the general arrangement or framework are similar. Some differences in the lists of GSP beneficiary countries are based on the conclusion of free trade agreements and therefore on the second option of the country graduation. The second reason is that the UK lists in this Schedule only beneficiary countries that fall solely under the GSP arrangement and not under another special arrangement such as the enhanced or LDC framework. Consequently, the GSP beneficiary countries are nearly the same, but the depiction of the lists of GSP beneficiary countries is different. The List of GSP+ beneficiary countries of EU´s and UK´s GSP schemes are identical. The main problem for the UK was that they had to verify that all current GSP+ members meet the current UK eligibility thresholds.[25] Since the EBA scheme applies to the least developed countries classified by the UN, the lists in both the UK's and EU's GSP scheme are still identical. Thus, the beneficiary countries of EU´s and UK´s GSP schemes currently only differ because of the conclusion of free trade agreements.[26]

The main problem lies in unevenly distributed trade.[27] The withdrawal of the UK from the EU caused a split of the markets served by developing countries. Because of the unevenly distributed trade between the UK and the EU, it is possible that the country-section graduation thresholds for the GSP scheme in the UK or the EU could be exceeded without any change in the competitiveness of the developing countries.[28] To maintain continuity, the UK has graduated the same goods as those graduated under EU´s GSP scheme at the time that the scheme came into effect.[29] Nevertheless, the annual review of the graduation thresholds may lead to a future change in the lists of beneficiary goods. The developing countries most affected by this issue are those that were already close to the graduation threshold before Brexit.[30] If both the UK and the EU had raised the graduation thresholds, a graduation without a change in the competitiveness could have been avoided post Brexit.[31]

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[24] Achim Rogmann, in Hans-Michael Wolffgang, Achim Rogmann and Georg Pietsch, *Kommentar für das gesamte Außenwirtschaftsrecht (AWR-Kommentar*), Einführung zur APS-VO, para. 35.
[25] Mattia Di Ubald, *A Post-Brexit Generalized System of Preferences for the UK: How to Guarantee unchanged market access for developing countries?* (2019) UK Trade Observatory, Briefing Paper 32, 4.
[26] Department for International Trade, *Information Pack on the UK´s Generalised Scheme of Preferences*, UK 2021, 6; Sophia Price, ´Brexit and the UK-Africa Caribbean and Pacific Aid Relationship`, Global Policy, (2018) Vol. 9, Issue 3, 426.
[27] Mattia Di Ubald, *A Post-Brexit Generalized System of Preferences for the UK: How to Guarantee unchanged market access for developing countries?* (2019) UK Trade Observatory, Briefing Paper 32, 4 ff.
[28] Mattia Di Ubald, *A Post-Brexit Generalized System of Preferences for the UK: How to Guarantee unchanged market access for developing countries?* (2019) UK Trade Observatory, Briefing Paper 32, 4.
[29] Department of International Trade, *UK Generalised Scheme of Preferences (GSP): goods graduation 2021 to 2022*, available at: <www.gov.uk/government/publications/uk-generalised-scheme-of-preferences-gsp-graduated-goods/uk-generalised-scheme-of-preferences-gsp-goods-graduation-2021-to-2022> accessed 16 January 2022.
[30] Mattia Di Ubald, *A Post-Brexit Generalized System of Preferences for the UK: How to Guarantee unchanged market access for developing countries?* (2019) UK Trade Observatory, Briefing Paper 32, 4.
[31] Mattia Di Ubald, *A Post-Brexit Generalized System of Preferences for the UK: How to Guarantee unchanged market access for developing countries?* (2019) UK Trade Observatory, Briefing Paper 32, 7;

The legislative proposal of the European Commission on the GSP scheme for the years 2024 - 2034 foresees that the GSP graduation thresholds will be reduced by 10 per cent to better target competitive products.[32]

The findings can be summarised as follows. Currently, there are no significant changes for developing countries in accessing EU´s or UK´s market under the different GSP schemes. In the near future, the main problems for developing countries will result from an unevenly distributed trade between the UK and the EU, which can cause a country-section graduation with the result of a part exclusion from preferential market access.[33]

EU´s revised GSP after 2023

On 22 September 2021, the European Commission adopted the legislative proposal on the GSP scheme for the years 2024-2034,[34] and forwarded it to the European Parliament and Council in order to commence the legislative procedure to amend the GSP.[35] The basic scheme consisting of the general arrangements and the two special arrangements is to remain in place in the future EU GSP scheme. Therefore, no problems regarding the general structure will occur after 2023. Furthermore, it is anticipated that the adjustment of the list of eligible countries caused by changes in the trade and development sectors of the countries concerned will be included. This results in more flexibility within EU´s GSP scheme in the light of changing economic conditions, compared to UK´s GSP scheme.[36]

In addition, the proposal provides an extension of the reasons for withdrawal of preferences under the EU GSP scheme in case of serious and systematic violations in the areas of environment and good governance.[37] However, the socio-economic impact of temporary withdrawal of tariff preferences in a beneficiary country will now to be taken into account. Overall, temporary withdrawal is to be made more flexible, to enable the EU to respond to abruptly arising circumstances, such as global health and hygiene emergencies. Furthermore, a fast-track procedure for temporary withdrawal of tariff preferences under the GSP scheme is envisaged for cases requiring a rapid response.[38]

In its resolution on the implementation of the current GSP scheme of 14 March 2019, the European Parliament already called for the EU to take even more effective action against social and environmental dumping and unfair competition and trade practices under the GSP

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and Peter Holmes, Jim Rollo and Alan L. Winters, ´Negotiating the UK´s post Brexit trade agreements` (2016) 238, National Institute Economic Review, 11.

[32] See Proposal for a Regulation of the European Parliament and of the Council on applying a generalised scheme of tariff preferences and repealing Regulation (EU) No 978/2012 of the European Parliament and of the Council, COM(2021) 579 final, 13.

[33] Mattia Di Ubald, *A Post-Brexit Generalized System of Preferences for the UK: How to Guarantee unchanged market access for developing countries?* (2019) UK Trade Observatory, Briefing Paper 32, 5 f.

[34] Proposal for a Regulation of the European Parliament and of the Council on applying a generalised scheme of tariff preferences and repealing Regulation (EU) No 978/2012 of the European Parliament and of the Council, COM(2021) 579 final.

[35] European Commission, *Trade and sustainability: Commission proposes new EU Generalised Scheme of Preferences to promote sustainable development in low-income countries*, available at: <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_4801> accessed 16 January 2022.

[36] COM (2021) 579 final, 1.

[37] COM (2021) 579 final, Leonie Zappel, ´50 Jahre APS der EU – Ein Anreiz für nachhaltige Entwicklung?` Part 2 (2021), 12, AW-Prax, 638.

[38] COM (2021) 579 final, 13.

scheme, thus ensuring a level playing field.[39] In order to improve the coverage of competitive goods, the legislative proposal foresees that the GSP graduation thresholds will be raised by up to 10 per cent for a large part of the goods.[40] Consequently, a further differentiation in market access for developing countries regarding the EU and UK market is possible.

In addition, the criterion of limited export competitiveness is to be abolished under the GSP+ scheme.[41] Thus, a country will already be considered vulnerable if the seven largest sections of its GSP-covered imports of Annex III products into the Union represent, on average over the last three consecutive years, more than 75 per cent of its total imports of Annex III products. This is particularly intended to facilitate access to GSP+ preferences for EBA beneficiary countries graduating from this scheme.[42]

Furthermore, comprehensive measures in the GSP scheme are to be implemented in order to promote positive developments in the environmental sector.[43] The European Parliament therefore recommended that the Paris Convention should be added to the list of 27 major international conventions to be respected by GSP+ beneficiary countries.[44] This recommendation is reflected in the legislative proposal on the EU GSP scheme. In addition to the Paris Climate Change Agreement (2015), the United Nations Convention against Transnational Organized Crime (2000) has been added to the list of now 32 key conventions.[45]

In several countries, export-processing zones (EPZs) are exempt from national labour laws, which prevents exercising the right to unionise and seek redress fully. This violation of International Labour Organization (ILO) core labour standards can lead to the impairment of human rights, and, according to Parliament's demands, must be taken into account in the reform of the EU's GSP scheme.[46] The legislative proposal thus added Convention No. 81 on Labor Inspection (1947), Convention No. 144 on Tripartite Consultation (1976), the Convention on the Rights of Persons with Disabilities (UN CRC, 2007), and the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (OP-CRC-AC, 2000) to the list of core UN and ILO conventions. These will form part of conditions to benefit from the GSP+ arrangement. In addition, GSP+ applicant countries shall be required to submit an action plan regarding the effective implementation of the relevant conventions.[47] The proposed amendment of the GSP+ arrangements is accompanied by a transitional arrangement for countries benefiting from the GSP+ arrangements under the current GSP Regulation. It is envisaged that the countries concerned will have to reapply for GSP+ benefits.[48] Thus, in comparison to UK´s GSP scheme, the obligations for GSP+ benefits might be significantly higher in EU´s revised GSP.

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[39] Implementation of the Generalised Scheme Preferences (GSP) Regulation, European Parliament resolution of 14 March 2019 on the implementation of the GSP Regulation (EU) No 978/2012 (2018/2107(INI)), OJ 2021 C23/100.
[40] COM (2021) 579 final, 13.
[41] OJ [2021] C23/103.
[42] COM (2021) 579 final, 6.
[43] Leonie Zappel, ´50 Jahre APS der EU – Ein Anreiz für nachhaltige Entwicklung?` Part 2 (2021), 12, AW-Prax, 638.
[44] OJ [2021] C23/102.
[45] COM (2021) 579 final, 16 f.
[46] OJ [2021] C23/103.
[47] COM (2021) 579 final, 17.
[48] COM (2021) 579 final, 17.

With regard to the rules of origin, there is a global demand on behalf of the developing countries to lower the requirements in the area of value-added content, and to simplify access to the markets of the industrialized nations via the rules of origin that can be fulfilled more easily as a result and ultimately facilitate preferential use..[49] This demand is contrary to the fears of circumventing imports and the protection interests of the economy of the industrialized countries. In the current GSP scheme of the EU, there is the possibility to request exemptions from the cumulation rules,[50] provided the beneficiary countries undertake sufficient efforts to meet the requirements of the EU. This requirement has been met in the legislative proposal.[51] Both regional and extended cumulation will be possible under certain conditions, such as the specific trade, financing and development needs of the beneficiary country.[52] Compared to UK´s GSP scheme, this leads to easier preferential market access to the EU market for goods that are not fully produced within the respective developing country.

Finally, the proposal on the future GSP scheme of the EU provides an extension of the reporting period from two to three years. This is intended to bring it in line with the reporting and monitoring periods of international bodies, while at the same time giving developing countries more time to address problems in the application of excess income, at the same time reducing the administrative burden.[53]

The findings can be summarised as follows. If the current legislative proposal for EU´s revised GSP as of 2024 comes into force, the differences and problems regarding the market access to both markets will grow,[54] but this could also be an opportunity for developing countries to redirect their export markets.[55]

Conclusion

At first sight, it appears that the UK has fully adopted the GSP scheme of the EU as post-Brexit standard, meaning that, essentially, nothing changes. Examining the lists of GSP and GSP+ beneficiary countries, considerable differences can be observed. These disparities result, on the one hand, from the fact that meanwhile the EU and the UK have concluded free trade agreements with different countries, which leads to the exclusion from GSP benefits. On the other hand, the import shares of developing countries to the EU and the UK are distributed differently, so that depending on the trade intensity, the import thresholds are exceeded, which can also lead to exclusion from GSP benefits. It has yet to be seen how far the EU and the UK will use the possibility to adjust the import thresholds in the future in order to achieve an equal market access for developing countries to both markets, or whether the differences will remain.

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[49] OJ [2021] C23/102.
[50] Cumulation ("accumulation") in this context means that processing carried out in other countries is "credited" in the acquisition of origin.
[51] Leonie Zappel, ´50 Jahre APS der EU – Ein Anreiz für nachhaltige Entwicklung?` Part 2 (2021), 12, AW-Prax, 638.
[52] COM (2021) 579 final, 34.
[53] COM (2021) 579 final, 3; Leonie Zappel, ´50 Jahre APS der EU – Ein Anreiz für nachhaltige Entwicklung?` Part 2 (2021), 12, AW-Prax, 638.
[54] Leonie Zappel, ´50 Jahre APS der EU – Ein Anreiz für nachhaltige Entwicklung?` Part 2 (2021), 12, AW-Prax, 638.
[55] Dirk Kohnert, ´More Equitable Britain-Africa Relations Post-Brexit: Doomed to Fail?` (2018) Vol. 52, Issue 2, Africa Spectrum, 119; ´US law firm hired for retaining Bangladesh´s duty-free market access to EU` *The Financial Express* (8 January 2021) available at: <https://go.gale.com/ps/i.do?p=STND&u=murdoch&id=GALE|A683166783&v=2.1&it=r&sid=summon&asid=d22f635d> accessed 21 January 2022.

With regard to GSP+ benefits, it also remains to be determined whether the UK will also introduce the EU's intended changes for GSP as of 2024. If there were no changes made by the UK, the requirements to obtain GSP+ preference with the UK would be significantly lower than the EU. This could lead to a further change in imports from developing countries. A similar situation applies to the EU's plan to change the reasons for the temporary withdrawal of preferences. If the UK leaves the current arrangements in place, then preferences could be temporarily withdrawn by the EU, while they are still granted by the UK.

It should also be borne in mind that there are currently 13 different GSP schemes worldwide, which are similar in their basic structure, but differ in their detailed provisions. However, this could also be seen as an opportunity for developing countries to redirect their exports and to target markets where they have preferential market access.

HUMAN RIGHTS

Covid-19 protocols, traditional religious beliefs and constitutional rights in the context of Nigeria and its people

Dr Yahya Duro Uthman Hambali*

Introduction

The traditional African belief is woven around supernatural being and deities such as belief in Islam and Christianity, belief in the African myths and deities such as *Ifa* (god of divination), *Sango* (god of thunder), *Ogun* (god of iron), *Oya* (god of river), *Obatala* (god of purity), and *Osayin* (god of divination or efficacious medicine). They also believe in the healing powers of these supernatural beings on all ailments and pandemics. The cvid-19 pandemic has attracted rigorous requirements of social distancing and lockdown. The health challenges brought about by its sudden appearance have impacted negatively on the communal life of Africans and the requirements of congregational prayers. The policy requirements of social distancing does not sit well with most Nigerians against the backdrop of their fundamental rights to freedom of thought, conscience and religion; peaceful assembly and association; and freedom of movement under sections 38, 40 and 41 of the Constitution of the Federal Republic of Nigerian 1999. The key objective of this article, therefore, is to interrogate the impacts of the covid-19 policies on social distancing and religious congregation and movement, and to find out whether there have been infringements of any or all of the constitutional rights, and whether any or all of the infringements are excused by any principle of law.

The concept of rights

Right is the totality of the conditions under which a person's choice can unite with the choice of another without negating the universal law of freedom.[1] It follows therefore that if the action of a person can co-exist with the freedom of everyone, in accordance with a universal law whoever obstructs the performance of that action is said to have harmed the right of that person.[2] According to Kant, freedom is the only innate and original right that belongs to every man or woman by virtue of their humanity, so long as such freedom can co-exist with the freedom of every other person in accordance with a universal law.[3] Kant's 'freedom' refers to that area of action that is totally left to a person by reason of their humanity after excluding what they are either required to do or prohibited from doing by the Doctrine of Right.[4]

Justification for human rights has given rise to debates between cultural relativism and universalism. The principle of cultural or ethical relativism is to the effect that all ethical judgments are relative to a framework, which then posits that human rights are equally relative to a framework.[5] The cultural relativists' arguments against human rights universalism is thought to express two ideas that have widespread appeal: (1) everyone is equally entitled to respect; (2) to respect a person entails respect for that person's culture,

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[1] Immanuel Kant, *The Metaphysics of Morals* (Cambridge University Press, 1996) 24.

[2] Ibid.

[3] Ibid 30.

[4] James Griffin, *On Human Rights* (OUP, 2008) 61.

[5] Ibid 130.

because culture constitutes, at least in part, a person's identity.[6] Cultural relativism is particularly problematic when it presents culture as static, homogeneous, coherent and consensual.[7] The major argument advanced against this concept is that there cannot be a universal framework for human rights, as the framework may differ from one society to another or from one circumstance to another.[8]

Universalism of human rights signifies that human rights transcend national, historical and cultural boundaries. The universality of human rights presupposes that the same rights are guaranteed to all within and between the state signatories in an international arena.[9] Universality of human rights is justified by Donnelly on three legal grounds:

> (1) Virtually all states consider internationally recognised human rights to be a firmly established part of international law and politics (international legal universality);
>
> (2) Virtually all cultures, religions, and leading worldviews participate in an overlapping consensus on these internationally recognised human rights (overlapping consensus universality); and
>
> (3) This consensus rests on the contemporary universality of standard threats to human dignity posed by modern markets and modern states (functional universality).[10]

Hence, Donnelly believes that human rights rest on the normative consensus of the international community on the list of rights as explained by his three legal grounds. This justification is however considered weak, in the sense that there is no consensus on the rights of women, or the morality of abortion or on a host of other issues.[11] In contrast, Griffin premises his concept of universalism of human rights on normative agency that involves living a worthwhile life.[12] Griffin's conception is grounded in concrete reality, in human beings rather than in abstract conceptions. He justifies human rights based on human dignity through his notion of 'personhood' or 'normative agency'.[13] According to him, human dignity lies in this capacity.[14] Accordingly, human rights in this sense protect this capacity because whatever threatens the capacity threatens our 'personhood' or 'normative agency' and the very existence of human dignity.[15]

However, Griffin's justification of human rights because of the link between human dignity and the capacity to act as autonomous agents has the unappealing implication that children, the severely mentally disabled, and individuals suffering from advanced dementia cannot

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[6] Michael Freeman, *Human Rights: An Interdisciplinary Approach* (2nd edn Polity Press, 2012) 126.
[7] Jack Donnelly, *Universal Human Rights in Theory and Practice* (3rd edn Cornell University Press, 2013) 108.
[8] Griffin (n 4) 130.
[9] Jennifer Corrin, 'Cultural Relativism vs Universalism: The South Pacific Reality' in Rainer Arnold (ed), *The Universalism of Human Rights* (Springer, 2013) 104.
[10] Donnelly (n 7) 94.
[11] Freeman (n 6) 69.
[12] Griffin (n 4) 45.
[13] Normative agency is understood to mean 'active autonomy combined with the concept of a meaningful life. See David N Stamos, *The Myth of Universal Human Rights: Its Origin, History, and Explanation, Along with a More Human Way* (Paradigm Publishers, 2014) 81.
[14] Griffin (n 4) 32.
[15] Ibid 33.

be said to have human rights due to their lack of capacity.[16] A more plausible justification for the universality of human rights, according to Renzo, would use the ideal of basic human needs. This justification has the advantage of accommodating children, the severely mentally disabled, including individuals suffering from advanced dementia, because, even though they do not have the capacity for Griffin's 'normative agency' or 'personhood', they certainly have basic human needs.[17]

This seems to find support in an earlier position held by Freeman who states that a common argument that human rights are justified on ground of human dignity is vague in the sense that human dignity could be relative and as well provide basis for moral theory.[18] Some cultures such as the West affirm the dignity of women while other cultures such as some parts of Africa consider women's dignity as affront to men's superiority.[19] To Freeman, the plausible justification for human rights is that advanced by the modern natural law theorists who argue that there are objective goods that cannot naturally be rejected, whether or not they are endorsed by consensus or by positive law.[20] Such objective goods include life, society and knowledge. They are an objectively necessary condition for human flourishing, and consequently serve as the ground for moral obligation.[21] This theory seeks to reconcile common good with individual rights, since it holds that 'the common good enhances individual freedom by providing it with stable social conditions, while individual freedom enhances the common good by promoting the flourishing of all. Human rights are, on this account, not subject to, but components of, the common good.'[22]

This article supports universalism of human rights as opposed to cultural relativism. It rejects cultural relativism for its rigidity, which ties human rights to consensual cultural frameworks. Such approach cannot work in the case of Nigeria where there is cultural diversity. Besides, it is difficult to strike a balance between Western and African cultures. Hence, the article finds such generalisation of cultural concepts quite problematic. The article supports the universality of human rights based on needs, as canvassed by Renzo, and rejects tying universality of human rights to human dignity as canvassed by Griffin because the latter is relative in the context of diverse cultural beliefs as in the case of the highly heterogeneous Nigeria. It upholds the 'need' theory because basic needs transcend national, international and cultural boundaries. An example of such needs in the context of this article is the right to freedom of thought, freedom and religion, which is the fulcrum of this article and, most importantly, germane to the essence of the tradition and religious beliefs in the healing power of the supernatural being over all ailments, including covid-19.

This article, therefore, focuses on the traditional religious beliefs and practices of the Nigerian people, which are rooted in their basic rights as constitutionally guaranteed, and how these rights were altered significantly by the effects of the covid-19 protocols introduced by the Federal and State governments in the bid to curtail the spread of COVID-19 pandemic. In this regard, the three dominant religions in Nigeria are identified, that is to say, Islam, Christianity and the traditional religion. Whereas Islam and Christianity are scriptural and have dominated the lives, beliefs and practices of many households,

[16] Massimo Renzo, 'Human Needs, Human Rights' in Rowan Cruft, S Matthew Liao and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (OUP, 2015) 574.
[17] Ibid 577.
[18] Freeman (n6) 69.
[19] Ibid.
[20] Ibid.
[21] Ibid.
[22] Ibid 69-70.

traditional religion is founded on the ancient beliefs and practices of another large group as well. Hence, in this article, the effects of these various beliefs on the compliance with covid-19 protocols in Nigeria will be discussed immediately following a brief history of the pandemic and its protocol's effect on the rights of the people. In a more purposeful attempt, the various human rights of Nigerians affected by the protocols are set out and discussed in section 4. The question whether infringement of the various rights occasioned by the protocols were actionable in the face of the various exemptions provided by the various laws in the land is answered in section 5. The article then finishes with conclusions and recommendations in section 6 of the paper.

A brief history of the Covid-19 pandemic and its protocols in Nigeria

On February 27, 2020, the Federal Ministry of Health confirmed the first COVID-19[23] case in Ogun State, Nigeria, making the country the third country in Africa to record an imported case after Egypt and Algeria.[24] The index case occurred in an Italian citizen who flew from Milan, Italy to Lagos, Nigeria on February 24, 2020, and travelled in a private vehicle on to his company site in Ogun State the same day. On February 26, 2020, he presented at the company clinic with symptoms consistent with COVID-19 and was referred to the Infectious Disease Hospital (IDH) in Lagos where a COVID-19 diagnosis was confirmed on February 27, 2020.[25] Upon the detection of the index case, the Nigeria Centre for Disease Control (NCDC) activated a multi-sectorial National Emergency Operations Centre (EOC) to oversee the national response to COVID-19.[26] Subsequently, the Presidential Task Force (PTF) for coronavirus control was inaugurated on March 9, 2020. The PTF announced that travellers from 13 covid-19 high-risk countries had been restricted from entering the country.[27] Between February 27, 2020 when the first index case was reported and May 31, 2020, 63,882 persons have been tested for covid-19 in Nigeria, of which 10,162 (15.9 per cent) were confirmed as being infected with severe acute respiratory syndrome virus 2 (SARS-CoV-2 by RT-PCR).[28]

As of March 22, 2020, the initial 30 confirmed cases in Nigeria were travellers from abroad or their immediate contacts. In order to minimise rising imported cases in the country, the Nigerian government introduced the initial international travel ban for passengers coming from countries with ongoing high transmission (initially China, Italy and Germany; subsequently extended to eight high-burden countries).[29] Ultimately, land borders were

[23] This is the abbreviation of Coronal Virus Disease, 2019. The disease, which was a novel type of virus, was discovered in 2019 and is accordingly referred to as COVID-19. COVID-19 is caused by severe acute respiratory syndrome virus 2 (SARS-CoV-2) and it was first reported in December 2019 by Chinese Health Authorities following an outbreak of pneumonia of unknown origin in Wuhan, Hubei Province. World Health Organization. Naming the coronavirus disease (COVID-19) and the virus that causes it. 2020. https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease- (covid-2019)-and-the-virus-that-causes-it. Available 30 May 2020.

[24] C Dan-Nwafor, C L Ochu, K Elimia, J Oladejo, E Ilori, 'Nigeria's public health response to the COVID-19 pandemic: January to May 2020' (2020) 10(2) *Journal of Global Health* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7696244/ accessed 10 April 2022

[25] Ibid.

[26] J Amzata, K Aminu, V I Kolo, A Akinyele, J A Ogundairo, M C Danjibo, 'Coronavirus outbreak in Nigeria: Burden and socio-medical response during the first 100 days' (2020) 98 International Journal of Infectious Diseases, 219 https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7307993/pdf/main.pdf, accessed 10 April 2022

[27] Ibid.

[28] This has been reported to be the active cause of COVID-19. Dan-Nwafor *et al* (n 24) 2 & 3.

[29] Dan-Nwafor *et al* (n 24) 5.

closed, all international flights were banned, and mandatory institutional quarantine and testing for international returnees to Nigeria was instituted on March 23, 2020 to reduce further importation of the disease from high-risk countries.[30] Another vital response was a lockdown to prevent community transmission. There was a lockdown in two states (Lagos and Ogun) and the FCT for four weeks effective from March 30, 2020, with restrictions on inter-state travels throughout the country.[31] Specifically, on March 30, 2020, the President of Nigeria issued a series of stringent non-pharmaceutical interventions, including stay-at-home orders and cessation of non-essential movements and activities in Lagos and Ogun States and FCT for an initial period of 14 days, extended for an additional 21 days in the same three states and adding Kano State.[32] The states were selected based on a combination of the burden of disease and their risk:[33] The lockdown included closure of schools and workplaces, bans on religious and social gatherings, cancellation of public events, curfews, restrictions on movement, and cessation of interstate and international travel. In practical terms, the various rights enjoyed by Nigeria residents began to suffer setbacks due to these restrictions. I will return to this in section four.

Alongside the federal lockdown in Lagos, and Ogun States and the FCT, many states adopted other measures, including school closure, movement restrictions, and curfews.[34] Though the lockdown slowed down transmission, it had undesired collateral effects on social protection, security, and daily subsistence for many. The consideration of a further lockdown had both intended and unintended consequences.[35]. The lockdown and stay-at-home directive caused adverse effects on peoples' livelihood—with disproportionate effects on the vulnerable population, most of whom are daily income earners.[36] Therefore, the drastic lockdown measures came with significant economic and social costs. Crime and domestic violence reportedly increased during the period and many people were unable to engage in their usual income-generating activities.[37] The consequential effects of the lockdown exacerbated already difficult situations for many, rendering prolonged enforcement of preventive interventions such as lockdown and physical distancing unsustainable.[38] According to a UNDP report on the impacts of lockdown on Nigerians, it was observed that the vulnerable population mostly works in the informal sector, which requires close person-to-person interactions for cash transactions and patronage.

Administration of justice in Nigeria was also not spared the effects of the lockdown. In an attempt to enforce social distancing in the Nigerian Courts, the Chief Justice of Nigeria (CJN), Justice Tanko Ibrahim Muhammad, CFR, as Chairman of the National Judicial Council, issued a circular directing the suspension of Court sittings in Nigeria for an initial period of two weeks, from 24 March 2020. However, a day before the expiration of the two-week period, CJN through a letter dated 6[t] April, 2020, directed all heads of Courts in Nigeria to suspend court sittings till further notice, with the exception of matters that are urgent, essential or time-bound according to extant laws. CJN reiterated that the suspension of Court sittings was in line with the Presidential Order made pursuant to the covid-19 Regulation 2020, which directed the lockdown of the Federal Capital Territory (FCT) as

[30] Ibid.
[31] Amzata *et al* (n 26) 221.
[32] Dan-Nwafor *et al* (n 24) 5.
[33] Ibid.
[34] Ibid.
[35] Ibid, 7.
[36] Amzata *et al* (n 26) 221.
[37] Dan-Nwafor *et al* (n 24) 5.
[38] Ibid, 7.

well as Lagos and Ogun States in order to prevent the spread of the pandemic.[39] The effect of this was denial of access to justice to the people. Suspects who were in remand custody pending their trials felt the delay and suspension of court activities more than litigants who were outside.

Then, a relaxed lockdown began on May 4, 2020, replacing the total lockdown with a curfew from 8 pm to 6 am while the interstate travel ban was still in place.[40] Hence, while the lockdown was critical for disease containment, it undermined the religious, economic and social foundations for survival and the resilience structures of Nigeria's most vulnerable population.[41]

Traditional religious beliefs and covid-19 protocols in Nigeria

Modern Science, used in relation to modern medical practice, utilises orthodox medicine in the treatment of sickness, while the traditional faith on the other hand, relying on traditional belief, adopts the use of traditional medicine in dealing with sickness. Although, the goal of both science and faith is health-care delivery to the people, the approach, method and processes adopted by science and faith in their health-care delivery to the people differ despite their common goal. This is due to the difference in their recognition of the causes of sickness. Whereas, in Yoruba traditional faith, most sickness that afflict man are natural i.e. they are always considered to be the product of supernatural forces; modern science on the other hand, believes that any sickness is a function of disorderliness or derangement in the body's bio-chemical system. We will return to this after examining the religious beliefs of a few ethnic nationalities as well as those of the adherents of the Muslim and Christian faiths that were impacted negatively by the effective implementation of the protocols in Nigeria

In the traditional Nigerian societies, there emerged several modes of worship depending on the beliefs of each society. Modes of worship comprise all modes of giving expression to the various feelings toward the divine power, feelings of awe, reverence, obligation, depreciation, gratitude, hope, etc. The traditional African people may not worship in the same way the Christians, Muslims, Hondnists or Buddhists would, but they get the message of the personality that manifests Himself to them in their peculiar situations.[42] Revelation is an act of God and to the understanding of African peoples, divine message can be obtained through the situation of things in their environment. The works of nature - rivers, hills, rocks, forests - instil the awareness in man that there is a superior force greater than himself.[43] From their various experiences of life, people form their religious concepts of deities and over a period of time, these concepts become established.[44]

Whereas the stopping points in reaching God in Christianity and Islam could be considered few, traditional religion has numerous steps (deities) that are duly respected and approached. In addition, when something went wrong in the welfare of the individual or his family, he

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[39] V. A. Oluwajobi and K Omojajowo, '*Covid-19: A Case for Online Courtrooms in Nigeria and the Admissibility of Electronic Evidence in Nigeria's Online Courtrooms,' (2020) Regulatory Framework and Policy on Financial Technology Company in Nigeria, (2020)* < https://www.researchgate.net/publication/343344219_COVID> accessed 28 Jan. 2022.

[40] Amzata *et al* (n 26) 221

[41] This report was not available at the time of this research; it is however referenced by Amzata *et al* in their article. Amzata *et al* (n 26) 221

[42] J. O. Kayode, *Understanding African Traditional Religion* (University of Ife Press, 1984)1

[43] Ibid, 2.

[44] Ibid.

immediately wondered who had caused it to happen. In most cases, the individual would suspect that someone had used evil magic, sorcery, or witchcraft against him or his household, animals, or fields.[45] The Igbo religion is one of the traditional African religions.[46] The Igbo tradition was rooted in their culture. Received orally by authorities, this tradition was transmitted from generation to generation through the same oral process. The Igbo religion fully embodies all characteristics of a traditional world religion, including its beliefs, sacred myths, oral qualities, strong appeal to the hearts of its followers, a high degree of ritualisation, and possession of numerous participatory parsonages such as officiating elders, kings, priests and diviners. They believe in a supreme being, believed to be the controller of the world and all its inhabitants.[47] Yoruba traditional religion is another form of worship in Nigeria.[48] In Ile-Ife alone,[49] there are over thirty-five shrines and these attract one religious worship or another in every day of the year except one.[50]

According to Kayode:

> An appreciation of the African Indigenous concept of God must involve an understanding of the pride of place given to ancestors. To the African peoples, life has no value at all if the presence and power of ancestral spirits are excluded. Ancestral spirits are the most intimate gods of the Bantu in South Africa - they are part of the family tribe and are consulted frequently. In Zambia, the consulted divinities are the ghosts of one's grandparents, parents, uncles, brothers etc. The Igbo and the Yoruba in Nigeria believe that their lives are profoundly influenced by their ancestors. In the everyday life of the Ga in Southern Ghana, the dead are believed to be present. Many have the regular habit of pouring libations of drinks whenever they are about to commence drinking (wine especially). They even go as far as throw a small morsel of food outside for their ancestors before starting to eat. In Sierra-Leone, Prayers are normally offered through succession of ancestors.[51]

Before the advent of Christianity, the medicine men in the Igbo nation acted as counsellors. Some acted not only as doctors but also as listeners to people's multifarious problems. They also acted as priests and prayed for their communities.[52] The Igbo people, who profess traditional religion, worship the Supreme Being through many minor gods or divinities. There are shrines erected for the worship of the lesser gods by the traditionalists[53].

The concept of divinities as intermediaries between the Supreme Being and mortals is central to Nigerian traditional beliefs. Every locality has its own local divinities. It is difficult to determine the number of these divinities, but over 400 lesser divinities and spirits are recognised by the Yoruba; most of whom have their own priests and followers.[54] The most significant of the divinities to this work is the god of efficacious medicine. It is called

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[45] C O. Okeke, C N Ibenwa, and G Okeke, 'Conflicts Between African Traditional Religion and Christianity in Eastern Nigeria: The Igbo Example' SAGE Open April-June 2017: 1–10 © The Author(s) 2017 DOI: 10.1177/2158244017709322, 3.
[46] Igbo is one of the major ethnic group in Nigeria.
[47] About Imbiti's work https://en.wikipedia.org/wiki/John_Mbiti accessed 3 April 2022
[48] This is another major ethnic group in Nigeria.
[49] Ile-Ife is a town in Osun State which is one of the six predominantly Yoruba speaking states in Nigeria.
[50] Kayode (n 45) 2.
[51] Ibid, 4.
[52] Okeke *et al* (n 45) 3.
[53] Ibid.
[54] Kayode (n 42) 32.

Osu among the Edo, while the Yoruba call him *Osanyin.*[55] There are also oracular divinities who serve the purpose of giving guidance on the right course of action to take and finding solutions to problems. These are the mouthpiece of the Supreme Being[56]. The oracular divinity is called *Ibnokpabi* and *Efa* (or *Ebu*) among the Igbo; *Idiong* among the Ekoi; *Akgbara* at Awka; *Ifa* among the Yoruba etc.[57]

Another traditional belief in Igbo land is their belief in Ancestor worship. The Igbo religious life is connected to their ancestors and to those not yet born creating a mystic continuum.[58] The Igbo society believes in character and has very strong belief in life after death. They believe that when a person dies, his soul or spirit wanders around the bush, until his relations perform the necessary and befitting burial rites. The Igbo religion considers that when an individual dies, their soul or spirit wanders until the body is given a proper burial. This waiting period is called the transitional period of the deceased.[59] The Igbo believe that ancestors wield tremendous powers of blessings and power of curse. After the interment of a fulfilled elder and after the obsequies must have been completed i.e. after the deceased interment into the world of the dead, the family usually the *ọkpala* (the first male child in the family), erects a shrine and creates an *okposi* (*ọfọ* like sticks) for venerating the spirit of the dead through prayers and sacrifices.[60]

As stated in the opening paragraph of this section, the approach of Modern and traditional medicine depends largely on their opposable views of the cause of sickness. These opposable views inform the differences in their methods of curing sickness.[61] The two phenomena attend to sickness using three layers of processes or methods i.e. diagnoses, causes, and treatments. With respect to diagnosis, the methods of diagnosis are not the same. This is because, the concept of sickness in traditional faith does not rely on the physical aspect of man and disease alone but also sees man as a combination of body, mind and spirit. These three are regarded as significant to what can cause sickness in man[62]. In this trado-medical diagnosis, the Yoruba Medicine man or native doctor may resort to consultation of *Ifa* oracle, ritual sacrifices and incantations. He may also seek the service of deity of divination called *Osanyin* in order to consult 'the unseen hand' to unravel the misery behind the problem of the patient. On the other hand, the medical science concentrate essentially on the body of the patient as anything spiritual in sickness is not known to science.[63] Hence, traditional worshippers do not belief there is a disease without cure, which informed why they did not believe there was anything novel about the outbreak and the incurability of covid-19 that would warrant the various protocols unleashed on them by the government.

In regard to causes, the causes of sickness differ between the two phenomena due to the difference in their approach to diagnosis. Because traditional religion rely on indigenous processes, the causes of sickness or any adversary are not in any way ordinary. Hence, the

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[55] Ibid, 33.
[56] Ibid.
[57] Ibid.
[58] About Imbiti's work (n 47).
[59] Ibid.
[60] Okeke *et al* (n 45), 3.
[61] R.A Olaoye, 'An analytical study of the concept of sickness in Modern Science and Traditional Faith of the Yoruba in Nigeria' in A.P. Dopemu, O. Obafemi, F.A. Oladele, O.B. Oloyede, S.O. Maloma, R.W. Omoloye and R.A. Olaoye, *Science & Religion in the service of Humanity* 153-163 (Local Society Initiative (LSI) and the Nigerian Association for the study and Teaching of Religion and Natural Sciences (NASTRENS) 2006) 153.
[62] Ibid, 154.
[63] Ibid.

belief of Yoruba traditional medicine is that sickness may be caused by so many reasons, ranging from witchcraft, sorcery, and wizardry.[64] Sin and enemy are also regarded as part of those occurrences that can bring sickness to man within the Yoruba traditional faith.[65] Medical Science on the other hand does not believe in suppositions but rather on empirical data derived from its search for the cause of sickness[66]. The Urhobo[67] perception of the aetiology of disease is of tripartite dimensions i.e., natural/physical causation, mystical/preter-natural causation and supernatural causation.[68] With respect to natural diseases, it is believed that the causes of natural diseases depend on cause-and-effect theory and as such, the remedy can be subjected to laboratory tests/analyses that gives rise to the discovery of active principles. Since no ritual is involved for this type of study of diseases, the treatment is considered rational.[69] Supernatural diseases are believed in Urboho tradition to be caused by witches, sorcerers and evil eyes of enemies while the divinities and ancestors are responsible for mystical diseases.[70] It is believed that mystical diseases arise mainly from breakdown in the filial relationship consequence on the failure of a victim to perform his obligation to the ancestors and/or the infringement of family moral code.[71]

In regard to treatment, Yoruba tradition based its treatment generally on traditional medicine, which is an embodiment of intricately interwoven processes. These processes are well rooted and efficacious having been tested over time[72]. This is often supported with an age-long adage often stated as follows:

> *Ewe gbogbo kiki ogun*
> *Ogun ti aba sa ti oje*
> *Ewe re loku kan*
> (All leaves are medicinal
> The medicine which is not efficacious
> Must have lacked one type of herb or the other).[73]

Hence, the use of herbal medicine occupies central position in the treatment of the sick by the Yoruba.[74] Yoruba also use occultism in the treatment of the sick. This belongs to the realm of mystery in which the traditional healer deals with the unseen but powerful metaphysical forces in exercise of which incantations or invocations are mostly employed.[75] Medical Science has nothing to do with metaphysics and its off shoots such as occultism or sacrifice. Several methods of treatment are adopted in Urboho traditional therapeutic process. These are: herbalism i.e., treatment through the use of herbs;[76] massage, which is adopted in the treatment of ailment of the nervous, muscular, osseous systems and especially for the treatment of gynaecological problems and man's temporary impotency;[77] hydro

[64] ibid 155.
[65] ibid 156.
[66] ibid 155.
[67] This is one of the major ethnic nationalities in the Niger-Delta Region of Nigeria. They are predominantly in Delta State of Nigeria.
[68] J.O. Ubrurhe, 'Life and Healing Process in Urhobo Traditional Medicine' in Dopemu *et al* eds (n 61) 245.
[69] Ibid.
[70] Ibid.
[71] Ibid.
[72] Olaoye (n 61) 157.
[73] Culled from Olaoye (n 61) 158.
[74] Ibid.
[75] Ibid 158.
[76] Ubrurhe (n 68) 246.
[77] Ibid 247.

therapy i.e. application of water of different forms and temperature for the treatment of ailments;[78] fasting to cure ailments such as obesity, indigestion, mental and chronic diseases,[79] and faith healing, which is associated with medico-religious practice.[80] However, an aspect of medical science that perhaps has a semblance of occultism, which is an aspect of Trado- medical science, is X-ray. However, X-ray has its limitations. X-ray can only disclose natural ailment rather than spiritual ailment. This is why it is believed among the Yoruba that X-ray cannot disclose the cause of a spiritual ailment in a person who has been so afflicted. The result of such X-ray will be negative.[81]

In Christian perspectives' four types of illness, each requiring different approach in seeking for a cure have been identified. These are: sickness of the spirit usually caused by the person's own sin; emotional sickness and problems usually caused by the emotional hurts of a person's past resulting in anxiety and fear; physical sickness of the body usually caused by disease; and Demonic oppression which usually consists of emotional problems or physical sickness and it can be due to demonic oppression.[82] It is believed that these illnesses can be spiritually healed. Accordingly, prayer for repentance is required for the healing of personal sin; prayer for inner healing (healing of memories) is required for the cure of emotional problems; prayer for physical healing is needed to the cure physical sickness; and for demonic oppression, prayer for deliverance is required for its cure.[83] Finally, the conditions for spiritual healing are faith, fasting and prayer; and forgiveness of sin.[84]

God said in the Holy Bible:

> 37. When famine or plague comes to the land, or blight or mildew, locusts or grasshoppers, or when an enemy besieges them in any of their cities, whatever disaster or disease may come, 38 and when a prayer or plea is made by anyone among your people Israel – being aware of the affliction of their own hearts, and spreading out their hands towards this temple – 39 then hear from heaven, your dwelling place. Forgive and act; deal with everyone according to all they do, since you know their hearts (for you alone know every human heart).[85]

The adherents of Muslim faith who are of larger population in Nigeria believe that there is no disease without a cure. This belief is drawn from the verses of the holy Qurʾān and the *Hadiths* of the holy Prophet Muhammad (PBOH) some of which are quoted hereunder. Allah says in the Qur'an, 'Say: 'To the believers it [the Qurʾān] is a guidance, and a healing.'[86] Similarly, in Qur'an 10 verse 57, Allah says, 'O men, now there has come to us an admonition [Qurʾanic revelation] from your Lord, and a healing for what is in the breast, and a guidance, and a mercy to the believers.'[87] The *ḥadīth*, or sayings and doings of the Prophet collected and compiled after Muḥammad's death, offer extensive commentary on disease and medicine. One of such *ḥadīth* is where Prophet Muḥammad (PBOH) was quoted to have said,

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[78] Ibid.
[79] Ibid 248.
[80] ibid 249.
[81] Olaoye (n 61) 159
[82] B.A Ogunbodede 'Spiritual Healing and Science: A Christian perspective' in Dopemu *et al* eds (n 61) 285.
[83] Ibid 286.
[84] Ibid 287.
[85] 1 Kings 8:37-39.
[86] Q 41:44.
[87] See also Q26:80.

> 'God has not sent down a disease without sending down a remedy for it'- transmitted by Bukhari; and that reported by Jabir that Prophet Muhammad (PBOH) said, 'There is a medicine for every disease and when the medicine is applied to the disease it is cured by God's permission.' Muslim transmitted it.'[88]

Hence, contrary, to the belief of the modern medicine that covid-19 is not a curable disease, the belief of the traditional worshippers and followers of Christianity and Islam is that there is no disease without cure and that all the COVID 19 protocols including the stay-at-home order were unnecessary and infringement of their basic rights

Human rights issues and Covid-19 protocols

Nigeria has a dualist system in which an international treaty law is not binding on the country until it is enacted into law by the National Assembly.[89] However, the Constitution of Nigeria contains a Bill of Rights in Chapter IV, as well as the mechanism for the enforcement of those rights.[90] The provisions in Chapter IV include: the right to life; right to dignity of human person; right to personal liberty; right to fair hearing; right to private and family life; right to freedom of thought, conscience and religion; right to freedom of expression and the press; right to peaceful assembly and association; right to freedom of movement; right to freedom from discrimination.[91] In order for the government of Nigeria to curtail the spread of COVID-19 like other sovereign nations, it introduced a number of non-pharmaceutical measures as noted earlier.[92] These measures, particularly, the sit-at-home, no doubt affected some of the basic and constitutionally guaranteed rights of Nigerians. It exposed the level of poverty in the country as it became obvious that the majority feed from their daily earnings. The basic rights affected by the protocols in Nigeria are the right to personal liberty; freedom of thought, conscience and religion; peaceful assembly and association; and freedom of movement. These rights will now be discussed in turn with respect to what the national and the regional laws state and how they were infringed upon by means of covid-19 non-pharmaceutical measures.

Right to personal liberty

Section 35 (1) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) provides that every person in Nigeria is entitled to his/her personal liberty and no one is to be deprived of this right without due process of law. Likewise, the African Charter on Human and Peoples Rights states:

> Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.[93]

Personal liberty means the right to freedom from wrongful or false imprisonment, arrest or any form of physical restraint whether in any common prison, or even in the open street without legal justification.[94] According to Lord Denning, the right to personal liberty means,

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[88] *Mishkāt al-maṣābīḥ*, Vol. III, 945.
[89] CFRN s 12 (1).
[90] CFRN s 46.
[91] CFRN ss. 33-42. Other rights in this category are right to acquire and own immovable property anywhere in Nigeria; and right to freedom against compulsory acquisition of movable and immovable property. CFRN ss43-44.
[92] See nn 30, 32, 35, 37 & 42.
[93] Art 6 African Charter on Human and Peoples Rights (ACHPR)
[94] K M Mowoe, *Constitutional Law in Nigeria* (Malthouse, 2008) 320

'the freedom of every law abiding citizen to think what he will, to say what he will on his lawful occasions without let or hindrance from any other person.'[95] It is however to be noted that liberty does not consist of the freedom to do any acts, but the freedom to do acts that do not impede with other persons.[96] Equality before the law is synonymous to liberty meaning that liberty implies freedom[97].

Stay-at-home orders and cessation of non-essential movements and activities in Lagos and Ogun States and FCT following the order of the President of the Federal Republic of Nigeria on 30 March 2022 were implemented. Other States governments then began to introduce similar measures as they witnessed the rise in the number of cases within their states. It is important to mention here that the lockdown measures included closure of schools and workplaces, bans on religious and social gatherings, cancellation of public events, curfews, restrictions on movement, and cessation of interstate and international travels. The net effects of the foregoing is that the constitutional right to liberty of the people was greatly impaired. This also affected the income of the larger populace as they were prevented from pursuing their daily sources of income. People like artisan such as vulcanisers, bricklayers, roadside automobile repairers, and petty traders etc. who live on what they earn daily from their trade were the most vulnerable. Feeding became difficult for this category of Nigerians and their families.

Right to freedom of thought, conscience and religion

This right is provided for under section 38 (1) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) as follows:

> Every person shall be entitled to freedom of thought, conscience and religion, including freedom to change his religion or belief, and freedom (either alone or in community with others, and in public or private) to manifest or propagate his religion or belief in worship, teaching, practice or observance.

The African Charter on Human and Peoples Rights also provides:

> Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be subjected to measures restricting the exercise of these freedoms.[98]

Freedom of religion enables every person individually or in community with others, whether in public or private to practice their belief in worship, practice or teaching.[99] This right rests on a tripod: freedom of thought, conscience and religion. Although, these rights are interrelated, they are distinct. The right to freedom of thought relates to the right to hold a view or idea that might be inconsistent with the view held by the majority or the mainstream ideals or beliefs. The right to freedom of conscience relates to moral judgment, the right to hold profound convictions on all matters. The right to freedom of religion relates to the right of a person to freely choose his/her belief or religion.[100]

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[95] Lord Denning, *Freedom under the Law* (Steven & Son, London 1948) 5.
[96] Y. Olomojobi, *Human Right and civil liberties in Nigeria: Discussions, Analyses, and Explanations* (2nd edn, Princeton 2018) 88
[97] Ibid
[98] Art 8 ACHPR.
[99] Olomojobi (n 96) 200.
[100] See the case of *Abdulkareem v. LASG* [2016] 15 NWLR (Pt. 1535) 177, where the full panel of the Court of Appeal held that the use of hijab (female Muslim headscarves) by female Muslims constituted an act of

As discussed in section three of this paper, Nigeria, as an African country, is an amalgamation of a highly heterogeneous communities whose religions are rooted in their diverse traditional beliefs. The people of Muslim faith are required to observe their obligatory prayers in congregation; those of Christian faith perform their acts of worship in congregation particularly through fellowships and Sunday worships, and the traditional religion worshippers commune with their deities in private and public as well as in association with fellow worshippers. All of the foregoing were put in abeyance with the implementation of the Stay-at-home order of the Federal and State governments to curtail the spread of COVD-19 pandemic. In particular, the annual *Eid Fitri,*[101] and *Eid Adha*[102] prayers that are enjoined on all Muslims to perform in congregation, were disallowed from taking place in 2020. Congregational *Salaat* is obligatory on all mature male Muslims. If one cannot hears the *Adhan* i.e. call to prayer but one is aware that a mosque is within, one is duty-bound to offer one's prayer at the mosque in congregation.[103]

Allah said in the holy Qur'an:

> O you who have attained faith! When the call to prayer is sounded on the day of congregation, hasten to the remembrance of God, and leave all the worldly commerce; this is for your own good, if you but knew it.[104]

Abu Hurayrah (RA) narrated: Allah's messenger (SAW) said:

> The reward of the prayer offered by a person in congregation is twenty-five times greater than that of the prayer offered in one's house or in the market (alone). And this is because if he performs ablution and did it perfectly and then proceeds to the mosque with the sole intention of praying, then for every step he takes towards the mosque, he is upgraded one degree in reward and his one sin is taken off (crossed out) from his account (of deeds). When he offered his *Salaat*, the angels keep on asking Allah's blessings and forgiveness for him as long as he is (staying) at his place and does not pass wind. They say O Allah! Bestow your blessings upon him; be merciful and kind to him.[105]

In the same vein, Christians were denied the opportunity of congregational worship during the Easter and Christmas celebrations in 2020 because of the lockdown. As well as this, the traditional worshippers were barred from performing public rituals and congregational worship either totally or partially. An instance is the annual Osun-Osogbo festival when rituals or sacrifices used to be made to the Osun goddess by her worshippers. This event draws worshippers of the river goddess from around the world to partake in the ritual worship. It also draws tourists from around the world. However, the Osun-Osogbo festival of 2020 ended on a low note due to Covid-19 rules. The event was strongly hit by the

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worship. Hence, the refusal to allow the appellants to wear it on their school uniform, is a clear infraction of their constitutionally guaranteed right.

[101] This is to mark the end of the month of Ramadan when Muslims across the world are required to fast and to observe two *Rakaat* superogatory prayers in congregation at the end of the month.

[102] This is period when Muslim faithful are required to sacrifice animal in the course of Allah and also observe two *Rakaat* superogatory prayers in congregation.

[103] R Jamiu, *Common Mistakes in Salaat* (As-salafy Productions, 2009), 30.

[104] Q 62:9

[105] Bukhari 620, 628.

pandemic. Only worshippers were allowed to perform the ritual, but with strict adherence to Covid-19 protocols.[106]

Right to peaceful assembly and association

Section 40 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) guarantees the civil rights of persons to assemble and associate with like minds, form and join political parties and trade unions for the protection of their common interest.

Article 10 of the African Charter on Human and Peoples Rights also provides:

> Every individual shall have the right to free association provided that he abides by the law. Subject to the obligation of solidarity provided for in article 29, no one may be compelled to join an association.

Hence, a person may therefore form or belong to any political party, trade union, or any other association, be it political, social, or economic, in the pursuance of lawful interests. However, this right does not extend to any right to form or belong to an assembly for public unrest or other unlawful purposes. In addition, the guaranteed freedom of association and assembly is subject to limitation of any law that is reasonably justifiable in a democratic society in the interest of defence, public safety, public order, public morality or public health; or for the purpose of protecting the rights and freedom of other persons.[107]

One of the essentials of the lockdown is the restriction on public gatherings. The communal life of typical Nigerians and the social gathering of age grade, club and associations meetings and events were negatively affected by this turn of events. People could not meet or move freely in company of others. Social interactions and communications were limited to social media rather than physical interaction. In consequence of this, people spent more money data to break even with their social life with their family and friends. However, the poor, who formed the larger percentage, and who could not afford the additional financial burden were subjected to severe boredom during the sit-at-home period of the pandemic.

Right to freedom of movement

Section 41(1) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) guarantees the freedom of movement of every citizen of Nigeria.

The components of this right under the Constitution are as follows:

1. Freedom to move freely throughout Nigeria
2. Freedom to reside in any part of Nigeria
3. The right not to be expelled from Nigeria
4. The right not to be refused entry into Nigeria, and
5. The right not to be refused exit from Nigeria.[108]

At regional level, Article.12 of African Charter on Human and Peoples Rights also states:

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[106]OsunFestival2020:https://www.google.com/search?q=osun+festival+2020&oq=osun+fest&aqs=chrome.7.69i57j0i512l9.18460j0j15&sourceid=chrome&ie=UTF-8 accessed 13 April 2022.
[107] *Governing Council of NTI Kaduna v. NASU* [2018] LPELR – 44557 (CA).
[108] See *Director of State Security Service & Anor v. Olisa Agbakoba* [1999] 3 NWLR (Pt. 599] 314.

1. Every individual shall have the right to freedom of movement and residence within the borders of a state provided he abide by the law.

2. Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality.

3. Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with laws of those countries and international conventions.

4. A non-national legally admitted in a territory of a state party to the present charter, may only be expelled from it by virtue of a decision taken in accordance with the law.

The lockdown measure in response to the spread of covid-19 caused severe restrictions to the movement of the people, both within and outside the country. Interstate travels were suspended. This led to a high shortage in food supply in the country. The South and the Northern parts of the country are inter-dependent in supply of foodstuffs. Traders who maintain the food chains were restricted from moving around the country for the purchase, transportation and supply of these essential needs of the people across regions. In consequence of this deficit, those who had stocked the food items before the movement restrictions resulted to hiking the prices of those food items thereby adding more economic hardship to the already fragile source of livelihood of the poor masses occasioned by the restrictions placed on them from pursuing their daily businesses.

Restrictions on and derogation from fundamental rights

Notwithstanding the copious protection of rights of citizens by the Constitution of the Federal Republic of Nigeria, the same Constitution makes provisions for situations when those rights can be suspended without infringing on the right of any individual who may suffer the consequence of such suspension. Surprisingly the African Charter on Human and Peoples Rights does not contain provision on derogation from human rights as in other regional conventions/instruments on Human Rights. However, the two dominant religions in Nigeria that is, Islam and Christianity, allow derogation from fundamental rights in some extreme circumstances.

Section 45(1) of the Constitution allows restrictions on fundamental rights and stipulates the grounds on which the right to private and family life,[109] the right to freedom of thought, conscience and religion,[110] the right to freedom of expression and press,[111] the right to peaceful assembly and association,[112] and the right to freedom of movement[113] can be taken away, derogated, or limited. However, it is sacrosanct in the Constitution that such derogation must be provided for in the interests of the State by laws that are reasonably justifiable in a democratic society on grounds of defence, public safety, public order, public morality, public health, or for the purpose of protecting the rights and freedom of other

[109] CFRN '99 s 37.
[110] CFRN '99 s 38.
[111] CFRN '99 s 39.
[112] CFRN '99 s 40.
[113] CFRN '99 s 41.

persons.[114] In addition, the Constitution permits restriction on the exercise of the fundamental right to liberty 'in the case of persons suffering from infectious or contagious disease, persons of unsound mind, persons addicted to drugs or alcohol or vagrants, for the purpose of their care or treatment or the protection of the community'.[115]

Likewise, Islam allows for restriction on and derogation from fundamental rights of the adherents of the Muslim faith when there is an outbreak of pandemic in any place. The holy Prophet Muhammad (PBOH) was reported by Sa'd to have said:

> If you hear of an outbreak of plague in a land, do not enter it; but if the plague breaks out in a place while you are in it, do not leave that place.[116]

It follows therefore that if a person hears of the outbreak of a plague or epidemic outside the place where the person currently is, that person is required not to enter that plagued land to safeguard his health. Likewise, if the outbreak of the epidemic occurs where the person is, such person is required not to leave the plagued land where he currently is in order to safeguard the health of others. The person whose land is plagued is not permitted to leave the land but should rather be patient and accept whatever Allah decrees for him.

Allah said in the Holy Qur'an:

> Everyone is going to taste death, and we shall test you with evil and with good by way of trial. And to Us you will be returned.[117]

Conclusions

It is clear from the foregoing that no right is absolute. The various non-pharmaceutical measures put in place by governments were meant to safeguard the health of the people whose fundamental rights were affected. The Constitution envisages circumstances when the health of the masses could be endangered unless some extreme measures are taken to avert mortality of a high magnitude. The net effect of the foregoing is that the protocols cannot be said to have infringed any fundamental right unjustifiably.

However, it became obvious from this research that the Nigerian government at all levels must work harder to bring down the poverty rate in the country which was easily aggravated by the sit-at-home order in response to the rise in cases in the country. The government could address this by identifying the vulnerable members of the public and assist them with interest-free loans to engage in Small Scale businesses. A lower digit interest loan could also be given to engage in Medium Scale businesses. There is need to create different job opportunities for the unemployed youths just as it is necessary to create a conducive environment for businesses to survive.

Finally, there is need to intensify efforts in the area of education and awareness campaigns on public health as well as limitations to fundamental rights under the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

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[114] See *Mbanefo v Molokwu* [2014] 1-2 SC (Pt. II) 137.
[115] CFRN '99 s 35 (1) (e).
[116] M. M. Khan, *The Translation of the Meaning of Sahih Al-Bukhari: Arabic-English Vol 7* (Daussalam) 30:5728.
[117] Q 21:35.

RECENT DEVELOPMENTS

HUMAN RIGHTS

Balancing expectations of privacy in police investigations with press freedom: the Supreme Court's decision in *Bloomberg v ZXC*

Dr Steve Foster*

Introduction

The Supreme Court has recently confirmed that as a general rule a person under criminal investigation has, prior to being charged, a reasonable expectation of privacy in respect of information relating to that investigation.[1] Consequently, as a starting point at least, the revelation of those details will amount to a breach of an individual's expectation of privacy, unless justified by any public interest defence or other circumstances which refute or outweigh that expectation. The Supreme Court stressed that this was only a general rule, or legitimate starting point, rather than a legal presumption, the finding of expectation being fact dependent. However, many fear that it will have a chilling effect on press freedom, and that it will skew the balance between privacy and free speech in this area.[2] The decision comes at a time when there is much debate about the judicial development of the law of privacy at the expense of free speech,[3] but equally, post-Leveson, when there is still much distrust of the press with respect to its investigative and reporting tactics.[4] This note argues that the decision in *Bloomberg*, although perhaps unexceptional on its facts, sets a dangerous (and potentially Convention-incompatible) precedent that will have a chilling effect on free speech in general, and distorts the balance between free speech and privacy in misuse of private information cases.

The facts and decision of the Supreme Court

In 2013, the appellants, Bloomberg LP, an international news and media organisation, had reported that a UK law enforcement body (UKLEB) was investigating allegations of fraud, bribery and corruption in relation to a company. In 2016, the appellants published an article about ZXC, the chief executive of the company, in connection with that investigation, and

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[1] *Bloomberg LP v ZXC* [2022] UKSC 5.

[2] Jim Waterson, 'Bloomberg loses landmark UK supreme court case on privacy: Media will find it harder to publish information about people in criminal investigations' *The Guardian*, 16 February 2022. See also, Joshua Rozenberg, 'Suspects and the Right to Privacy' (2022) 119 (7) *Law Society Gazette* 11.

[3] See Jake Kanter 'Media Groups Raise Concerns in response to Human Rights Act Consultation', *The Times*, 22 March 2022. More specifically, the government has expressed concern over the use by wealthy business people of SLAPS (Strategic Lawsuits Against Public Participation): Ministry of Justice, Strategic Lawsuits Against Public Participation – a Call for Evidence, 17 March 2022, available at https://consult.justice.gov.uk/. See now the Strategic Litigation Against Public Participation (Freedom of Expression) Bill 2021-22 (HL Bill 134) received its first reading on 18 March 2022 (HL Vol 820 col 571.

[4] *Leveson Inquiry - Report into the culture, practices and ethics of the press*, 29 November 2012. Gemma Horton, 'Celebrity Privacy and Celebrity Journalism: has anything changed since the Leveson Inquiry?' (2020) 25(1) Communications Law 10.

in late 2016 published a second article in which it referred to a formal letter of request from UKLEB to a foreign government, seeking banking and business records in relation to the company and nine named executives, including ZXC. Pointing out that letters of request in general and this letter of request, are labelled confidential,[5] the Supreme Court noted that the judge had found that the article contained information drawn almost exclusively from the Letter of Request, a copy of which had been obtained by the Bloomberg journalist. The Court further found that it had been given to the journalist in what must have been (and should have been recognised as) a serious breach of confidence by the person who originally supplied it.[6] Despite UKLEB's investigation into the company being in the public domain, no charges were brought against ZXC.

ZXC claimed damages for misuse of private information by Bloomberg LP and applied for an interim injunction to remove an article about the investigations from its website. That application failed as in the court's view the Article 8 rights were likely to be outweighed by the defendant's Article 10 rights.[7] The High Court then found that ZXC's Article 8 rights outweighed the defendant organisation's Article 10 rights.[8] In the court's view, there was a clear public interest in maintaining the confidentiality of the investigations, and the justifications for the breach of ZXC's privacy did not outweigh his Article 8 rights.[9] The Court of Appeal upheld that decision,[10] finding that the judge had been right to conclude that those who simply came under suspicion by an organ of the state had, in general, a reasonable and objectively founded expectation of privacy in relation to that fact.[11] Further, the judge had not wrongly confused private information with confidential information when considering whether there was a reasonable expectation, and had rightly made clear that the letter's confidentiality was not determinative of whether ZXC had a reasonable expectation, while placing reliance on its highly confidential nature in determining that the information was private.[12] Further, the judge had rightly accepted that the investigation was a matter of public interest, and had brought that into the balance, but had noted the letter's confidential nature had been apparent from its terms.[13]

The appellants appealed to the Supreme Court on the issue of whether the fact that information published by them about a criminal investigation originated from a confidential law enforcement document rendered that information private and/or undermined Bloomberg's ability to rely on the public interest in its disclosure. The Supreme Court also considered whether the Court of Appeal was wrong to uphold the findings of Nicklin J in the High Court that the claimant had a reasonable expectation of privacy and that the balancing exercise came down in favour of the claimant.[14]

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[5] *Bloomberg LP v ZXC* [2022] UKSC 5, at [17]. In *National Crime Agency v Abacha* [2016] EWCA Civ 760, the Court of Appeal noted the confidential nature of such letters, accepting that it was right to start from the position that letters of request are confidential (Goss LJ, at [48].
[6] *Bloomberg LP v ZXC* [2022] UKSC 5, at [17], citing Nicklin J in *Bloomberg LP v ZXC* [2019] EWCH 970 (Ch), at [125].
[7] Decision of Garnham J, 2 February 2017. In the High Court, Nicklin J was very critical of the defendant's candour in those earlier proceedings: *Bloomberg LP v ZXC* [2019] EWCH 970 (Ch), at [73-75].
[8] *Bloomberg LP v ZXC* [2019] EWCH 970 (Ch).
[9] *Bloomberg LP v ZXC* [2019] EWCH 970 (Ch), at [125], at [126] and [132-133].
[10] *ZXC v Bloomberg LP* [2020] EWCA Civ 611. See Nicole Moreham 'Privacy and police investigations: ZXC v Bloomberg [2021] 80(1) CLJ 5.
[11] *ZXC v Bloomberg LP* [2020] EWCA Civ 611, at [81-88].
[12] *ZXC v Bloomberg LP* [2020] EWCA Civ 611, at [90-92].
[13] *ZXC v Bloomberg LP* [2020] EWCA Civ 611, at [115-116].
[14] *Bloomberg LP v ZXC* [2022] UKSC 5, at [63].

In dismissing the appeal, the Supreme Court found that the general rule or legitimate starting point described by the lower courts was not a legal presumption, and whether there was a reasonable expectation of privacy was a fact-specific enquiry.[15] The Court also pointed out that this will not invariably lead to a finding that there was a reasonable expectation of privacy in the information.[16] The Court then explained that the rationale for the starting point was that publication of such information ordinarily caused damage to the person's reputation and to multiple aspects of the person's physical and social identity protected by article 8.[17]

Despite its insistence that this did not obviate the need of the claimant to prove an expectation of privacy, the Court accepted that in applying the presumption in these cases, it was likely that the expectation of privacy would be proved. Thus, it recognised that it was being asked whether the general rule in relation to this category of information was similar to the general rule in relation to certain other categories of information, most strikingly information concerning the state of an individual's health, which was widely considered to give rise to a reasonable expectation of privacy.[18] It then conceded that a consideration of all the circumstances of the case, including, but not limited, to the so-called *Murray* factors,[19] will, in relation to certain categories of information, generally lead to the conclusion that the claimant objectively has a reasonable expectation of privacy in information within that category.[20]

In justifying the starting point, the Supreme Court noted that for some time, judges have voiced concerns as to the negative effect on an innocent person's reputation of the publication of the fact that they were being investigated by the police or an organ of the state.[21] It then referred to a number of cases that had, in its view, led to a general rule or legitimate starting point that such information is generally characterised as private at stage one.[22] These cases included judgments with respect to contempt of court,[23] but also a number

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[15] *Bloomberg LP v ZXC* [2022] UKSC 5, at [67]. It was accepted, at [77], that if someone is charged with a criminal offence there can be no reasonable expectation of privacy, that being the rational boundary, as the open justice principle in a free country is fundamental to securing public confidence in the administration of justice, citing *Scott v Scott* [1913] AC 417.

[16] *Bloomberg LP v ZXC* [2022] UKSC 5, at [68].

[17] *Bloomberg LP v ZXC* [2022] UKSC 5, at [71], citing *Niemietz v Germany* (1992) 16 EHRR 97, at [29]. Again, in the Court's view, the public's understanding of the effect on a person of publication of information that they were suspected of having committed a criminal offence was a question of fact rather than of law. The question was how others would react to the publication of information that the person was under investigation: *Bloomberg LP v ZXC* [2022] UKSC 5, at [107-108].

[18] *Bloomberg LP v ZXC* [2022] UKSC 5, at [72], referring to see Eady J in *McKennitt v Ash* [2005] EWHC 3003 (QB), at [142].

[19] *Murray v Express Newspapers Ltd* [2008] EWCA 446, where the following factors were regarded as relevant: the attributes of the claimant; the nature of the activity in which the claimant was engaged; the place at which it was happening; the nature and purpose of the intrusion; the absence of consent and whether it was known or could be inferred; the effect on the claimant; and the circumstances in which and the purposes for which the information came into the hands of the publisher.

[20] *Bloomberg LP v ZXC* [2022] UKSC 5, at [72], citing Buxton LJ in *McKennitt v Ash* [2007] EWCA Civ 1714, at [23]

[21] *Bloomberg LP v ZXC* [2022] UKSC 5, at [80].

[22] *Bloomberg LP v ZXC* [2022] UKSC 5, at [81].

[23] *Attorney General v MGN Ltd* [2011] EWHC 2074 (Admin), which led the Leveson Inquiry to recommend that save in exceptional and clearly identified circumstances, the names or identifying details of those who are arrested or suspected of a crime should not be released to the press nor the public (at Part G, Chapter 3, para 2.39). Recently, the Appeal Court of the High Court of Judiciary decided that a person had committed an offence under s.11 of the Contempt of Court Act 1981 by disclosing the identity of complainers in a

of cases where the courts had found an expectation of privacy with respect to police investigations and arrest.[24] In particular, the Supreme Court referred to the judgment of Mann J in *Richard v BBC*,[25] where the judge had stated that as a matter of general principle, a suspect has a reasonable expectation of privacy in relation to a police investigation. [26]

Moving to the issue of the presumption of innocence, the appellants submitted that the impact of the presumption eliminates, or significantly reduces, the negative effects of publication of such information, arguing that the lower courts had significantly overstated the likelihood of publication damaging the claimant's reputation, and underestimated the public's ability to observe the legal presumption of innocence. They relied in particular on the dicta of Lord Roger in *Re Guardian News and Media Ltd*,[27] where he noted that the law proceeds on the basis that most members of the public understand that, even when charged with an offence, one is innocent unless and until proved guilty in a court of law. Further, that understanding applied if you are someone whom the prosecuting authorities are not even in a position to charge with an offence and bring to court.[28]

However, the Supreme Court then referred to its later decision in *Khuja v Times Newspapers Ltd*,[29] where the majority of the Supreme Court held that whether the public would have equated suspicion with guilt was a question of fact. Thus, although, as a general rule, the public understand that there is a difference between allegation and proof, whether they did so would differ from case to case.[30] Thus, in the Supreme Court's view, it was apparent that the public's understanding of the effect on a person of publication of information that they are under police suspicion of having committed a criminal offence is a question of fact.[31] The Supreme Court in *Bloomberg* then justified the establishment of the starting point of privacy in misuse of information cases, by first stating that the presumption of innocence is a legal presumption applicable to criminal trials. It then stated that all the evidence from case law and practice in this area now admits to only one answer, namely that the person's reputation will ordinarily be adversely affected causing prejudice to personal enjoyment of the right to respect for private life.[32]

The Supreme Court then considered the interaction between the law and defamation and misuse of private information cases. First, it stated that it was inappropriate to read the defamation law concept of a hypothetical reader into the tort of misuse of private

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sexual offence case, despite that person claiming he had a good reason for doing so: *Murray v Lord Advocate* [2022] HCJAC 14.

[24] *Bloomberg LP v ZXC* [2022] UKSC 5, at [90-4]. The cases included *Hannon v News Group Newspapers Ltd* [2014] EWHC 1580 (Ch)*; Crook v Chief Constable of Essex Police* [2015] EWHC 988 (QB)*; ERY v Associated Newspapers Ltd* [2016] EWHC 2760 (QB); and *Mosley v Associated Newspapers Ltd* [2020] EWHC 3545 (QB).

[25] [2018] EWHC 1837 (Ch).

[26] *Richard v British Broadcasting Corporation* [2018] EWHC 1837 (Ch), at [248]. The judge held that if the public were universally capable of adopting a completely open and broad-minded view of the fact of an investigation so that there was no risk of taint either during the investigation or afterwards then the position might be different.

[27] [2010] UKSC 1.

[28] *Re Guardian News and Media Ltd* [2010] UKSC 1, Lord Rodger, at [66].

[29] [2017] UKSC 49, a case where the public's understanding of the presumption of innocence was considered in the context of press reporting and open justice. See Robert Craig, 'The end of innocence: open justice, free speech and privacy in the modern constitution – Khuja v Times Newspapers Ltd' (2019) 82(1) MLR 129

[30] *Khuja v Times Newspapers Ltd* [2017] UKSC 49, Lord Sumption at [9].

[31] *Bloomberg LP v ZXC* [2022] UKSC 5, at [107].

[32] *Bloomberg LP v ZXC* [2022] UKSC 5, at [108].

information, thus allowing a defendant to claim a less serious or harmful meaning to the publication.[33] This was because in misuse of private information cases, part of the factual enquiry was as to the effect on the claimant of publication, which did not require an objective assessment. Rather, the factual enquiry as to how others perceive the claimant can include a range of reactions including that some may perceive the claimant as guilty, whilst others may perceive his or her conduct as having given cause for the criminal investigation.[34] Despite that distinction, with respect to reputational damage, the Supreme Court held a person's reputation clearly fell within the scope of private life within Article 8, if the attack on reputation attained a certain level of seriousness and caused prejudice to that right.[35]

The appellants were dealt a further blow when the Supreme Court stressed that this case turned not on identifying the nature of the activity (potential corruption), but on the private nature of the information about the investigation. Thus, the private nature of that investigation was not affected by the specifics of the activities being investigated.[36] Further, the courts below had not failed to consider the claimant's attributes. Accordingly, ZXC's status as a businessperson involved in a large public company meant that the limits of acceptable criticism of him were wider than in respect of a private individual, but that had to be balanced against the effect of publication on the claimant's reputation.[37]

Finally, the Supreme Court dismissed the defendant's argument that it had been wrong to hold that even where a claim for breach of confidence had not been pursued, the fact that the published information originated from a confidential law enforcement document rendered the information private and undermined its ability to rely on the public interest defence. The Supreme Court noted that the judge treated the confidentiality of the information as being a relevant and important factor at both stage one and stage two, but did not treat it as being determinative.[38] It had not been necessary to show that information was confidential in order to prove that it was private and those courts had been aware of that distinction and had not fallen into error on that point.[39] Nevertheless, the judge was right to place reliance on the public interest in the observance of duties of confidence when carrying out the balancing exercise,[40] and that that public interest both weakens the justification for interfering with or restricting the right of privacy, and strengthens the justification for interfering with or restricting the right to freedom of expression.[41]

[33] *Bloomberg LP v ZXC* [2022] UKSC 5, at [110].
[34] *Bloomberg LP v ZXC* [2022] UKSC 5, at [112].
[35] *Bloomberg LP v ZXC* [2022] UKSC 5, at [121]. Relying on *Denisov v Ukraine* (Application No 76639/11), (unreported) 25 September 2018, *Pfeifer v Austria* (2007) 48 EHRR 8, and *Axel Springer AG v Germany* (2012) 55 EHRR 6 (Grand Chamber). As argued below, this allows the claimants a double benefit when bringing the action in misuse of private information, and deprives the defendant of some advantages inherent in defamation proceedings.
[36] *Bloomberg LP v ZXC* [2022] UKSC 5, at [129].
[37] *Bloomberg LP v ZXC* [2022] UKSC 5, at [140-141]. Therefore, the Supreme Court found that the balance had been applied correctly in ZXC's favour.
[38] *Bloomberg LP v ZXC* [2022] UKSC 5, at [148].
[39] *Bloomberg LP v ZXC* [2022] UKSC 5, at [150-151].
[40] *Bloomberg LP v ZXC* [2022] UKSC 5, at [152].
[41] *Bloomberg LP v ZXC* [2022] UKSC 5, at [153].

The impact of *Bloomberg* on investigative journalism, free speech and privacy protection

Following the public, and personal furore after the case of *Sir Cliff Richard v BBC*,[42] it was feared that non-disclosure of details with respect to early police investigations was to become the norm, the press having to wait at least until the individual is charged. This could have a chilling effect on press reporting where it raises matters of public debate, which are beyond question in this case, and were evident in *Richard*.[43] That such publication and debate is discouraged, even as a starting point could deter the media from investigating and reporting on such matters, and might well be in conflict with the European Court's jurisprudence on free speech and public debate. Although the decision might provide greater latitude to the press than before when reporting *after* charge, at present the decision has simply caused fear and distrust from the media. For example, Dawn Alford, Executive Director of the Society of Editors noted that the ruling that will have far-reaching implications for the British media and that legitimate public interest journalism will go unreported.[44] This observation is part of a wider concern that in the post-Human Rights Act era the courts have developed the law of privacy to such an extent that free speech and media freedom has been compromised a concern shared by the present government and one reason why it feels the Act is in need of reform.[45]

At present, the test of legitimacy is whether the courts are following the jurisprudence of the European Court of Human Rights, and thus maintaining the essential principles of privacy, press freedom and proportionality. In that regard, the decision gives rise to several areas of concern. First, it is established that when in conflict neither of these rights should be given a 'trump' status, the question of which right prevails being determined by proportionality.[46] Although the Supreme Court is clear that its ruling has not disturbed this, the starting point is bound to have an effect on the court's balancing exercise, added weight being given to the claimant's expectation of privacy because of its impact on the presumption of innocence and enhanced damage to the private life and reputation of the claimant. The Supreme Court has in effect created a presumption that the defendant has acted illegitimately in transgressing this rule, placing the defendant further on the back foot, and making it more difficult at the second stage to justify this interference via the defence of public interest.

Second, by the Supreme Court's rejection, then use, of the rules of defamation and free speech, the defendant in these cases suffers a double blow to press freedom and its opportunity to counter the claimant's *prima facie* expectation of privacy claim. The Supreme Court first rejects a comparison with defamation principles when considering the

[42] [2018] EWHC 1837 (Ch). For a critical commentary on the case, see Thomas DC Bennett and Paul Wragg 'Was Richard v BBC correctly decided?' [2018] 23(3) *Communications Law* 151

[43] See Steve Foster, 'Media responsibility, public interest broadcasting and the judgment in Richard v BBC' [2018] 5 EHRLR 490, at [501].

[44] Society of Editors, 'Far-reaching implications of Bloomberg privacy ruling, says SoE' 16 February 2022. See also, Jim Waterson, 'Privacy Laws could be rolled back following SC ruling', *The Guardian*, 19 February 2022 (online version).

[45] Daniel Martin, 'Vow to stop un-British 'drift' to privacy law as Dominic Raab eyes overhaul of Human Rights Act to 'correct' freedom of speech imbalance in wake of Duchess of Sussex court case'. *The Daily Mail*, 6 December 2021.

[46] *Re S (Publicity)* [2005] 1 AC 593, where Lord Steyn identified the following considerations as being of particular importance in carrying out the balancing exercise: an intense focus on the comparative importance of the specific rights being claimed in the individual case; the justifications for interfering with or restricting each right"; and the proportionality of the respective interference or restriction.

likely meaning that the article would have had on the readership.[47] The appellants are thus reminded that the claimants have not brought an action in defamation, but in misuse of private information, where different tests apply.[48] Yet the Court proceeds to employ defamation principles when considering the likely injury caused to the claimant by the revelation of the details of the investigation.[49] Thus, the Court rejects the appellant's claim that that the information was protected because it belonged to a part of the individual's life which was of no one else's concern. That, in the Court's view, was an unduly restrictive view of the ambit of Article 8, as a person's reputation clearly fell within the scope of private life within that Article, if the attack on reputation attained a certain level of seriousness and caused prejudice to the claimant's article 8 right.[50]

This leaves the defendant in an invidious situation. Because the claimant has chosen not to pursue a defamation claim, they benefit from the more liberal approach adopted in misuse of private information cases. Had the case been brought in defamation, the defendants would have been likely to successfully plead that the natural meaning of the revelation was that the claimant was being investigated, not that they were guilty, but as the case is for misuse of private information and dependent on an expectation of privacy, the claimant has been injured by the revelation.[51] This, of course, is a natural consequence of the claimant's choice, and no one doubts that the actions are indeed different. However, the inequity in this case has been created by the Supreme Court's over-zealousness in protecting the claimant from pre-charge revelations. Having found that this starting point is justified because of the potential damage to the claimant's reputation, the Court is then unable to back track and provide the appellant's with the defences and leeway they would have received had they been defending a defamation claim. If the claimant benefits when bringing what is essentially a privacy claim, then surely the defendants are entitled to rely on reciprocal principles of press freedom that would be available in defamation proceedings. To provide the claimant with both benefits skews the balancing act that the courts are bound in law to carry out in conformity with the jurisprudence of the European Court of Human Rights, considered below. Naturally, *any* defendant is on the back foot when the court finds an expectation of privacy, which the defendant then has to override in the second stage. However, if the court has classed that type of information as so important as to give rise to a starting point of expectation, then that is bound to affect the balancing exercise at the second stage.

Third, the Supreme Court insists that the nature of the claimant's activities should be restricted to the private nature of the commercial data, not including the possible criminal

[47] *Bloomberg LP v ZXC* [2022] UKSC 5, at [110-112].
[48] Note, in *Clarke v Rose* [2022] 3 WLUK 121, Judge Lewis refused to grant interim injunction against a campaigner under the 1997 Act to prevent her making allegations of abuse against them, where the focus of the complaint was defamation rather than harassment. The judge noted that a libel injunction was not normally granted where a defendant had stated their intention of defending any libel action at trial, and they had evidence to prove the allegations (*Bonnard v Perryman* [1891] 2 Ch. 269). See also *LNS v Persons Unknown* (the John Terry case) [2010] EWHC 119, where the interim and 'super' injunctions were refused because in essence the claimant was attempting to defend his reputation, and was thus bound by the rule in *Bonnard*.
[49] This may also impact on the assessment of damages. See Jeevan Hariharan, 'Damages for reputational harm: can privacy actions tread on defamation's turf?' (2021) 13(2) Journal of Media Law 186.
[50] *Bloomberg LP v ZXC* [2022] UKSC 5, at [121]. Under s.1 of the Defamation Act 2013, a statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant, and harm to the reputation of a body that trades for profit is not "serious harm" unless it has caused or is likely to cause the body serious financial loss.
[51] See Nicola Moreham 'Privacy and police investigations: ZXC v Bloomberg' (2021) 80(1) CLJ 5, at 7.

nature of those investigations. Again, this provides very generous protection to the Article 8 rights of the claimant, and insufficient recognition to the argument that any reasonable expectation of privacy in respect of police investigations needs to be reconciled with the principle that individuals should not be allowed to suppress evidence of their own wrongdoing.[52] The appellants argued that the High Court and Court of Appeal had failed to apply the multi-factorial analysis laid down in *Murray*,[53] in particular that they had incorrectly confined the factor of the nature of the activity in which the claimant was engaged to ZXC being the subject of the investigation, rather than it being identified as alleged corruption.[54] In response, the Supreme Court noted that the present case turned not on identifying the nature of the activity, but on the private nature of the information about the investigation; thus the private nature of that investigation was not affected by the specifics of the activities being investigated.[55] Accordingly, the public interest reason for the potential breach of the claimant's expectation of privacy is of no relevance; the fact that the information was being investigated was enough to found the expectation. Of course, the defendant will be allowed to raise this factor at the second stage, but as we shall see by that stage the legitimate expectation is already strongly established and weighted, and the public interest arguments may rarely win out, as they might in other cases not dealing with this type of information.[56] The approach may also be at odds with the European Court's decision in *Axel Springer v Germany*,[57] discussed later, unless we accept that the starting point is fully justified in cases of pre-arrest disclosures, and thus that different rules apply.

In any case, the Supreme Court found that the courts below *had* considered the claimant's attributes, and that ZXC's status as a businessperson involved in a large public company meant that the limits of acceptable criticism of him were wider than in respect of a private individual.[58] However, consideration of the claimant's attributes had to be balanced against the effect of publication on him, and the courts below had committed no error in that respect.[59] As argued above, once the starting point has been established, the status of the claimant, and the public interest element at the second stage, is in danger of being lost or forgotten.[60] Although this appeal primarily concerned the question of legitimate expectation of privacy rather than whether the revelation was justified in the public interest, the Supreme Court had several opportunities to temper the effect of its starting point by reiterating the importance of investigative journalism, and by reducing the privacy expectations of

[52] Nicola Moreham 'Privacy, reputation and alleged wrongdoing: why police investigations should not be regarded as private' (2019) 11(2) *Journal of Media Law* 142. Of course, in the present case, this refers to the investigation of *suspected* wrongdoing.
[53] *Murray v Express Newspapers Plc* [2008] EWCA Civ 446.
[54] *Bloomberg LP v ZXC* [2022] UKSC 5, at [128].
[55] *Bloomberg LP v ZXC* [2022] UKSC 5, at [129-131].
[56] Nonetheless, it is conceded that the decision reconcilable with its previous decision in *JR38's Application for Judicial Review, Re* [2015] UKSC 42. In that case, the publication by the police of images of a 14-year-old boy apparently committing public order offences did not violate his Article 8 rights, as the boy could not have had a reasonable expectation that photographs of him committing the offences, taken for the limited purpose of identifying him, would not be published. This decision relegates the other *Murray* factors, including the boy's age, because of the nature of the claimant's activities, yet in *Bloomberg*, the Supreme Court quite rightly contrast the claimant's wholly suspected activities with the events in JR38 in finding that there has been a breach of the Court's starting point with respect to pre-charge revelations.
[57] (2012) 55 EHRR 6 (Grand Chamber).
[58] *Bloomberg LP v ZXC* [2022] UKSC 5, at [140].
[59] *Bloomberg LP v ZXC* [2022] UKSC 5, at [140-141].
[60] Thus, once the Supreme Court had laid down the essential principles of its starting point, it dispensed with the question of whether the facts disclosed a breach in one sentence. – 'This case clearly falls into the category of information in which the legitimate starting point applies': *Bloomberg LP v ZXC* [2022] UKSC 5, at [145].

powerful claimants. This gives rise to real concerns over the weighting of the rights, and, more generally, the precarious position of press freedom and the public interest in these cases.

Fourth, the Court's approach to the presumption of innocence gives scant recognition to the claim that the public can recognise the clear distinction between a person's guilt on the one hand, and the suspicion of guilt on the other, the latter carrying with it a presumption of innocence. Instead, the Supreme Court was strongly influenced by the potential harm caused to the individual's reputation by the public being informed of the investigations. The Court's dismissal of Lord Rodger's dicta in *Re Guardian Newspapers*,[61] is, it is argued, overly dismissive of the public's ability to see the difference, and thus damaging to public debate on such issues; the courts' presumption of harm in these cases frustrating any public discussion and decision on the investigation and its inferences. Further, in the Supreme Court's view, publication of this information would assist the clarification of the public's perception and understanding of the issues, and failure to mention the suspects would lead to a disembodied story and the matter being given a lower priority in the media.[62] In the present case, the Supreme Court stressed that in *Re Guardian*, the Supreme Court had certainly not laid down a rule of presumption in favour of publication. True, there might be evidence that the public understanding of a particular publication is likely to be that the person was in fact guilty. Yet, to turn that possibility into a general starting point, so that we are assuming that disclosure before arrest will be damaging to the individual's reputation and expectation of privacy is, it is submitted, a considerable judicial leap, and one that could damage press freedom.

Fifth, it has been suggested that the action in this case should have been taken under the law of confidentiality rather than misuse of private information, thus providing a more targeted, and less potentially disruptive, basis for liability.[63] In this case, the defendants certainly acquired a duty of confidentiality, which made it easier to accept the right of confidentiality/legitimate expectation of privacy, and, potentially, reject any public interest defence.[64] To apply the rules of confidentiality to misuse of private information cases in general provides an unnecessary weighting to the Article 8 claim, with a potentially disadvantage to the defendants at both stages.

Finally, the decision of the Supreme Court follows a number of recent decisions that are unfavourable to press and media freedom, and which have thus tilted the balance in favour of individual privacy. In *PSJ v News Group Newspapers*,[65] the Supreme Court held that the press could be prohibited from disclosing private information despite that information reaching the public domain and being available on social media.[66] Whist it might be

[61] [2010] UKSC 1. See Michael Bohlander, 'Open Justice or Open Season?' [2010] *Journal of Criminal Law* 321.
[62] *Re Guardian Newspapers* [2010] UKSC 1, Lord Rodger at [60].
[63] See Nicola Moreham, 'Police investigations, privacy and the Marcel principle in breach of confidence' (2020) 12(1) Journal of Media Law 1, and Nicola Moreham 'Privacy and police investigations: ZXC v Bloomberg'(2021) 80(1) CLJ 5, at 8. Contrast Robert Craig and Gavin Phillipson 'Privacy, Reputation and anonymity: ZXC goes to the Supreme Court (2021) 13(2) *Journal of Media Law* 153, at 170-171.
[64] See, for example, *McKennit v Ash* [2007] 3 WLR 194 (breach of personal confidentiality), and *HRH Prince of Wales v Associated Newspapers* [2007] 2 All ER 139 (breach of confidentiality and copyright).
[65] [2016] UKSC 6.
[66] See Jacob Rowbotham 'Holding back the tide: privacy injunctions and the digital media' [2017] 133 LQR 177; Keina Yoshida 'Privacy injunctions in the internet age: PJS v News Group Newspapers Ltd' [2016] EHRLR 434.

legitimate to distinguish private information cases from traditional confidentiality claims in this respect,[67] maintaining injunctions in such cases can have an unnecessarily damaging effect on press freedom and free speech.[68] Second, decisions such as *Richard* have been instrumental in restricting the scope of the public interest defence where the courts find that the media have been guilty of irresponsible journalism or broadcasting, or of making a good story or good television at the expense of furthering the public interest.[69] Whilst this fact should be taken into consideration when conducting the balancing exercise, or, in *Bloomberg*, in assessing the level of the expectation of privacy, cases such as *Richard*, and now *Bloomberg,* have created presumptions that apply more generally in this area, and damage the public interest defence beyond those cases where irresponsible journalism is clearly present on the facts.[70]

The decision of the Supreme Court and ECHR jurisprudence

It will be interesting to see whether the appellants in *Bloomberg* choose to pursue a case before the European Court of Human Rights. On the one hand, the Strasbourg Court appears satisfied with the general balancing exercise carried out by the domestic courts in these cases. It may therefore show due respect to the Supreme Court's ruling, in its balancing of Article 8 and 10 rights, as it did in the *Campbell* case when it was referred to the Strasbourg Court.[71] On the other hand, the decision might be regarded as unduly restrictive of press freedom and investigative journalism, clashing with many of the principles that the Court has established in the area of public interest free speech.[72] Specifically, the Court might feel that the starting point could have a chilling effect on press freedom and the defendant's right to raise any public interest defence. In this respect, the European Court's rejection of Max Mosely's claim, that the press should have a legal duty to inform an individual that they intend to publish private information, is illustrative.[73] In that case, the European Court had regard, in particular, to its implications for freedom of expression, not limited to the sensationalist reporting at issue in this case, but to political reporting and serious investigative journalism, and that the introduction of restrictions on the latter type of journalism required careful scrutiny.[74] Specifically, the Court felt that that in order to prevent a serious chilling effect on freedom of expression, a reasonable belief that there was a public interest at stake would have to be sufficient to justify non-notification, that a narrowly defined public-interest exception would increase the chilling effect of any pre-

[67] *Attorney General v Guardian Newspapers* [1988] 1 AC 109.
[68] Ursula Smartt, 'Are privacy injunctions futile in the digital age? Why Scottish papers choose to name the super injunction A-listers - and why they cannot do so online' (2017) *European Intellectual Property Review* 413.
[69] See also the case of *Channel 5 v Ali* [2019] EWCA 677, noted by Steve Foster, 'Interfering with editorial judgment, making ''good television'' and the loss of the public interest defence' (2019) 24(3) *Communications Law* 102.
[70] Steve Foster, 'Media responsibility, public interest broadcasting and the judgment in Richard v BBC' [2018] 5 EHRLR 490, at 503.
[71] *Campbell v MGN Ltd* [2004] 2 AC 457. In *MGN Ltd v United Kingdom* (2011) 53 EHRR 5, the European Court found that the majority of the House of Lords recorded the core Convention principles and case law relevant to the case, and had underlined in some detail the particular role of the press in a democratic society and, more especially, the importance of publishing matters of public interest: *MGN Ltd v United Kingdom* (2011) 53 EHRR 5, at [145
[72] In particular, the principles laid down in *Sunday Times v United Kingdom* (1979) 2 EHRR 245*, Lingens v Austria* (1986) 8 EHRR 407, *Oberschlick v Austria* (1995) 19 EHRR 389, *Observer and Guardian v United Kingdom* (1991)14 EHRR 153, and *Axel Springer v Austria* (2012) 55 EHRR 6.
[73] *Mosley v United Kingdom* (2011) 53 EHRR 30.
[74] *Mosley v United Kingdom* (2011) 53 EHRR 30, at [121].

notification duty.[75] It is argued, therefore, that the inclusion of the starting point of privacy might have a similar chilling effect on press freedom and the availability of the public interest defence in misuse of private information cases.

The European Court's balancing exercise is similar to the one adopted by the domestic courts in *Murray*,[76] but as domestic law is informed by the case law of the Strasbourg Court, the traditional jurisprudence of the European Court in this area is a natural starting point. In that respect, the Supreme Court's ruling could be criticised at three levels.

First, it fails to take into account the fact that the claimant in this case was a large, public company, where different rules of investigation and privacy expectation apply, and that the lower courts failed to give due weight to the commercial attributes of the claimant, in accordance with the principle laid down in *Oberschlick v Austria (No 2*).[77] In that case, the Court stressed that the protection of reputation of politicians was less than would be accorded to a private individual, and that the limits of acceptable criticism, are wider with regard to a *politician* acting in his public capacity than in relation to a private individual.[78] Thus, the appellants argued that businesspersons actively involved in the affairs of large public companies, such as the claimant, are not, in that sector of their lives, private individuals, but rather knowingly lay themselves open to close scrutiny of their acts by the media, and the courts below had failed to give adequate consideration to the attributes of the claimant.[79] The Supreme Court accepted that it was a relevant consideration at stage one in determining whether the information can be characterised as private. However, it stressed that it was only one factor, to be balanced against the effect of publication of the information on him.[80] The Supreme Court then re-enforced the importance of the starting point by stating that the ordinary conclusion in relation to the effect of publication of information that an individual is under criminal investigation is that damage occurs, whatever his characteristic or status. Indeed, the Court stated it might be that the damage to a businessperson actively involved in the affairs of a large public company would be *greater* than to a private individual.[81] In any case, the Court considered that the judge was entitled to identify the most significant *Murray* factor as being the circumstances in which and the purposes for which the information came into the hands of the publisher, and to place less emphasis on the status of the claimant.[82]

The Supreme Court's ruling on this point is, it is argued, a distortion of the European Court's case law. In *Steel and Morris v United Kingdom*,[83] the Court conceded that in principle Article 10 did not deprive multi-national and public companies of the right to bring

[75] *Mosley v United Kingdom* (2011) 53 EHRR 30, at [126].
[76] In *Axel Springer v Germany* (2012) 55 EHRR 6, the Grand Chamber established the relevant criteria as: whether the article contributed to a debate of general interest; the subject of the article and how well-known the relevant person was; the prior conduct of the person; the method of obtaining the information and its veracity; the content, form and consequences of the publication; and the severity of the sanction imposed, at [62].
[77] (1997) 25 EHRR 357
[78] *Oberschlick v Austria (No 2)* (1997) 25 EHRR 357, at [29].
[79] *Bloomberg LP v ZXC* [2022] UKSC 5, at [136]. The Court cited *Fayed v United Kingdom* (1994) 18 EHRR 393, that in respect of the enforcement of the right to a good reputation under domestic law, the limits of acceptable criticism are wider with regard to businessmen actively involved in the affairs of large public companies than with regard to private individuals, at [75].
[80] *Bloomberg LP v ZXC* [2022] UKSC 5, at [140].
[81] *Bloomberg LP v ZXC* [2022] UKSC 5, at [140].
[82] *Bloomberg LP v ZXC* [2022] UKSC 5, at [141].
[83] (2005) 41 EHRR 22.

proceedings in defamation, or to obviate the requirement for the defendants to prove the truth of any statement.[84] Nevertheless, the Court stressed that such companies inevitably laid themselves open to increased public scrutiny.[85] The question in our case, therefore, is whether it is sufficient for the courts simply to take the commercial attributes of the claimant into account as one, unexceptional factor, when they have already established reputational harm as, if not the leading factor, the starting point of the balance. In such cases, the European Court might feel that the balancing exercise is being skewed in favour of the claimant, and that its traditional jurisprudence on public interest speech is being undermined.

Secondly, The Court rejects the claim that Article 8 should not be relied on in order to complain of a loss of reputation that resulted from the claimant's actions. Having accepted that the notion of private life covered the right to reputation,[86] the Supreme Court cited the case law of the European Court that Article 8 cannot be relied on in order to complain of a loss of reputation that is the foreseeable consequence of one's own actions, such as, for example, the *commission* of a criminal offence.[87] It then noted that in *Denisov v Ukraine,*[88] the Grand Chamber had stated that any such suffering could not *in itself* amount to an interference with the right to respect for private life, extending that principle to cover not only criminal offences but also other misconduct entailing a measure of legal responsibility with foreseeable negative effects on private life.[89] The Supreme Court acknowledged that this factor could be taken into account at stage one in determining whether the claimant has established a reasonable expectation of privacy in the relevant information in a case, for instance, where a person is actually convicted of a criminal offence or investigated and found to have committed the alleged misconduct.[90] However, although conceding that the reference in *Denisov v Ukraine* to 'other misconduct entailing a measure of legal responsibility' was one that can be taken into account at stage one, it noted that the examples provided by the Court related to misconduct established after authoritative findings following an official investigation.[91] Of course, the jurisprudence should draw a distinction between proven conduct and investigations into suspected acts, but to classify the latter as prima facie private, almost irrespective of the public interest in such investigations is, it is argued overly protective of individual privacy.

Thirdly, and more generally, have domestic courts failed to give due weight to the role of the media in investigating matters of public interest, and is the starting point in conflict with that role? The Supreme Court accepted that in considering the public interest in publication, the contribution that publication will make to a debate of general interest is a factor of

[84] *Steel and Morris v United Kingdom* (2005) 41 EHRR 22, at [94].
[85] *Steel and Morris v United Kingdom* (2005) 41 EHRR 22, at [94].
[86] *Bloomberg LP v ZXC* [2022] UKSC 5, at [145], citing *Pfeifer v Austria* (2007) 48 EHRR 8, at [35].
[87] *Pfeifer v Austria* (2007) 48 EHRR 8, at [98], *Denisov v Ukraine* (Application No 76639/11) (unreported) 25 September 2018, and *Axel Springer v Germany* (2012) 55 EHRR 6.
[88] Application No 76639/11) (unreported) 25 September 2018.
[89] *Denisov v Ukraine*, Application No 76639/11) (unreported) 25 September 2018, at [95], citing *Gillberg v* Sweden (2012) 34 BHRC 247.
[90] *Bloomberg LP v ZXC* [2022] UKSC 5, at [123], citing *Sidabras and Džiautas v Lithuania* (2004) 42 EHRR 6, where a person was proved to be a former KGB officer, and thus lost his expectation of privacy and reputation under Article 8.
[91] *Bloomberg PL v ZXC* [2022] UKSC 5*,* at [123]. The Supreme Court did not consider that misconduct is confined to a finding at the end of a criminal or other authoritative process. For instance, an armed bank-robber who held hostage a number of customers and employees in a televised three-day siege could hardly claim a reasonable expectation of privacy when s/he surrendered and was arrested. This would appear to justify the Supreme Court's decision in *JR38's Application for Judicial Review, Re* [2015] UKSC 42.

particular importance.[92] Thus, in *Von Hannover v Germany,*[93] the Court stated that it should be the decisive factor in balancing the protection of private life against freedom of expression,[94] and in *Axel Springer* it was said to be an initial essential criterion.[95] Yet in this case, the Supreme Court are adamant that any public interest in publication was offset by the public interest in upholding the confidentiality of the letter of request, and the appellant's clear breach of such confidentiality. Thus, the Letter of Request clearly stated disclosure of its contents will pose a material risk of prejudice to a criminal investigation, and that the claimant had a particular interest in avoiding prejudice to, and maintaining the fairness and integrity of, that investigation.[96] It is argued that the Supreme Court has taken these factors, together with the predominant weight it attaches to the starting point, to exclude any meaningful consideration of the public interest in modifying the individual's expectation of privacy. Such confidentiality exists for very sound reasons, although primarily to safeguard the integrity and fairness of the investigation, rather than specifically to protect the individual's privacy interests. In any case, the factor of confidentiality should not dominate the court's inquiry at either stage, and may conflict with the European Court's jurisprudence. For example, in *Sunday Times v United Kingdom*,[97] the European Court found that the domestic courts' interpretation of contempt laws centred entirely on the need to secure the administration of justice, to the exclusion of the very great public interest in the matter to which the offending articles related to.[98] Similarly, the Supreme Court's judgment could be said to have the same effect on curtailing investigative journalism on matters of public debate, at least until the parameters of the starting point's exceptions are articulated.

The Court has certainly provided the domestic courts with a good deal of discretion in this area,[99] although Korpisaari notes that the Court is often prepared to adopt a *de novo* approach in assessing whether the domestic authorities achieved the appropriate balance.[100] However, one recent decision of the European Court suggests that it would favour the Supreme Court's (and the recent domestic courts') approach to defending privacy rights over free speech, particularly where the reporting is regarded as unnecessary or unprofessional. In *M.L. v Slovakia*,[101] the Court upheld a claim under Article 8 of the mother of a deceased priest where, after his death, the press had published stories of his previous convictions for sexual abuse and a possible link between it and his supposed suicide. In giving judgment in favour of the applicant, the Court accepted that, generally, Article 8 could not be relied on in order to complain of a loss of reputation that is the foreseeable consequence of, *inter alia*, the *commission* of a criminal offence.[102] However, it then stressed that a criminal conviction does not deprive the convicted person of his or her right to be forgotten; all the more so if that conviction has become spent, and that, after a certain period of time, persons who have been convicted have an interest in no longer being

[92] *Bloomberg PL v ZXC* [2022] UKSC, 5, at [62].
[93] *Von Hannover v Germany* (2005) 40 EHRR 1.
[94] *Von Hannover v Germany* [2005] 40 EHRR 1, at [109].
[95] *Axel Springer v Germany* [2005] 41 EHRR 22 at [90].
[96] *Bloomberg PL v ZXC* [2022] UKSC 5, at [152].
[97] (1979) 2 EHRR 245.
[98] *Sunday Times v United Kingdom* (1979) 2 EHRR 245, at [65].
[99] *MGN Ltd v United Kingdom* (2011) 53 EHRR 5, and *Mosley v United Kingdom* (2013) 53 EHRR 30 on the balancing exercise carried out by the UK domestic courts.
[100] Päivi Korpisaari, 'Balancing freedom of expression and the right to private life in the European Court of Human Rights - application and interpretation of the key criteria' (2017) 22(2) *Communications Law* 39.
[101] Application No 34159/17, decision of the European Court of Human Rights 2021.
[102] *M.L. v Slovakia*, Application No 34159/17, decision of the European Court of Human Rights 2021, at [38].

confronted with their acts.[103] Again, it is noted that this dicta was concerned with the commission of criminal offences, but if the rule were not to preclude investigations of criminal conduct before charge, could, in spirit apply to such investigations, albeit in a naturally more circumscribed way.

The Court noted that the material was presented in a sensational and gossip-like manner, with flashy headlines placed on the front pages, along with photographs of the applicant's late son, and were presented as statements of fact rather than value judgments.[104] Although accepting that the articles raised matters of public interest and debate,[105] it was convinced that it was possible to inform the public adequately about the matter by simply reporting only the facts accessible from the publicly available criminal files. Further, although the pre-eminent role of the press in a democracy and its duty to act as a "public watchdog", different considerations apply to press reports concentrating on sensational and, at times, lurid news, intended to titillate and entertain, aimed at satisfying the curiosity of a particular readership regarding aspects of a person's strictly private life.[106]

The government has highlighted this case in its recent plans to reform the Human Rights Act,[107] pointing to a growing trend for the European and domestic judges to protect privacy above press freedom, particularly after the *Von Hannover* ruling.[108] Nevertheless, there are several aspects of the Supreme Court's ruling that might attract the European Court's interest. First, there is little doubt that the rule, or starting point, has a disadvantageous effect on the balancing exercise in general and the availability of any public interest defence, both generally and in *Bloomberg*. The starting point does, in reality create a presumption in favour of the claimant's privacy and a presumption of non-publication, which can only be *especially* damaging to any subsequent inquiry into any public interest publication. Equally, although the Supreme Court stresses that the starting point admits of exceptions, in practice it bears some of the characteristic of a blanket rule, irrespective of other factors that would normally be taken into consideration. Consequently, there will be insufficient opportunity for the presumption to be reversed in cases of a strong public interest.

Conclusions

The starting point is clearly favoured and adopted by all relevant state agencies, who regard it as an unbreakable rule. However for the courts to adopt this as the starting point in their judicial balancing act, risks them attaching undue weight to the fact that the defendants had broken the law, or practice, of confidentiality, and to them applying that rule disproportionately in the law of misuse of private information. Whilst that starting point

[103] *M.L. v Slovakia*, Application No 34159/17, decision of the European Court of Human Rights 2021, at [38]. The Court thus took into account that not only were the articles in question published several years after the applicant's son's criminal convictions, but also after those convictions had become spent (at [39])
[104] *M.L. v Slovakia*, Application No 34159/17, decision of the European Court of Human Rights 2021, at [42-43].
[105] *M.L. v Slovakia*, Application No 34159/17, decision of the European Court of Human Rights 2021, at [50].
[106] *M.L. v Slovakia*, Application No 34159/17, decision of the European Court of Human Rights 2021, at [53], citing *Mosley v United Kingdom*, Application No. 48009/08, decision of the European Court 10 May 2011
[107] Ministry of Justice, Human Rights Act Reform: a Modern Bill of Rights, A consultation to reform the Human Rights Act 1998, December 2021, at para 9 and 204-217.
[108] *See M.A. Sanderson 'Is Von Hannover v Germany a step backward for the substantive analysis of speech and privacy interests? (2004) EHRLR 631.*

might be acceptable in the statutory law of contempt,[109] in cases where the courts' essential role is to balance the respective Convention rights, it is both unnecessary and unjust to apply it as rigorously in cases involving the privacy, or reputation of the claimant.

As with the decision of the High Court in *Richard,* the decision of the Supreme Court in *Bloomberg* was made in the context of very loose and perhaps negligent journalistic practice. In *Richard*, that led to the High Court - perhaps inadvertently - restricting the availability of the public interest defence when the media indulge in what is perceived as unprofessional journalism, and seeking to make 'good' television.[110] This can create a chilling effect on future investigations, and promote further judicial distrust of the media, which can, perhaps inadvertently, be reflected in the court's balancing exercise. Similarly, in *Bloomberg*, the Supreme Court was clearly unimpressed by the tactics employed by the defendants, including their blatant disregard of the confidentiality of the letter and the need to preserve the integrity in those proceedings. Such confidentiality exists to maintain the continuation of those investigations, rather than the privacy of those under investigation. It should not justify a starting point in establishing an expectation of privacy in all cases, albeit with exceptions. It is argued that the creation of this starting point risks distorting the courts' subsequent enquiries at both stages, exacerbated by the Court's refusal to consider the public interest reason for the appellant's investigation and subsequent publication. Consequently, at the second stage, the public interest defence is given little if no weight. Thus, in subsequent cases, defendants might find that they have damned themselves by their breach of confidentiality and of this newfound presumption, or starting point, of privacy. Further, the claimant's expectation of privacy in this case has survived despite being an officer a large corporation who are being investigated for fraud and corruption; these factors being considered as single factors and now outweighed by the dominant element of harm to reputation and the presumption against pre-charge disclosure.

An application to the European Court of Human Rights cannot fully remedy the potential inequalities created by this decision: the European Court is not a court of appeal on domestic law, and must decide the case based on the facts presented to it by the applicant. Only if it feels that the Supreme Court's application of the starting point test disadvantaged Bloomberg could if find a violation; otherwise, we would have to wait for a further application to the Court, on more promising and worthy facts.

This of course presumes that the European Court would regard the starting point, or presumption, as an unnecessary or disproportionate impediment to free speech and the media's opportunity to defend itself from actions in misuse of private information. In *MGN* v *United Kingdom*, the Court provided the national courts with a good deal of discretion in balancing the two conflicting rights and upheld the House of Lord's decision despite pleas that it had failed to adequately uphold principles of free speech and public debate. Yet in other cases, the Court has been more sympathetic to the media, and in *Mosely,* it defended the press from a pre-disclosure rule that would have struck at the heart of press freedom. The European Court's traditional jurisprudence on press freedom has certainly been modified post- *Von Hannover*,[111] and there is evidence of a greater pro-privacy approach in

[109] For example, under s.11 of the Contempt of Court Act, creating an offence of disclosing individual identity against a judge's order.
[110] Steve Foster, 'Media responsibility, public interest broadcasting and the judgment in Richard v BBC' [2018] 5 EHRLR 490, at 503.
[111] *M.A. Sanderson 'Is Von Hannover v Germany a step backward for the substantive analysis of speech and privacy interests?* (2004) EHRLR 631.

the last two decades,[112] illustrated most starkly by the recent decision in *ML v Slovenia*. Despite that, it is argued that the Supreme Court's ruling constitutes an unnecessary and insufficiently inflexible extension of Article 8, disturbing the delicate balance between privacy and free speech rights.

[112] See Michael Tugendhat, 'Privacy, Judicial Activism and Free Speech (2018) 28(2) *Communications Law* 63.

CORPORATE LAW

The Nigerian Corporate Manslaughter Bill: a thousand steps to nowhere

Dr. Khairat Oluwakemi Akanbi*

Introduction and background

The 2012 Dana plane crash in Nigeria was greeted with condemnation and general outcry across the length and breadth of the country, and even beyond. The crash was one too many as there had been series of plane crashes in Nigeria over time. One echoing issue from the crash was the question of whether or not the airline could be criminally liable for the deaths of the over 150 people involved in the crash. However, the existing legal framework via the Criminal and Penal Codes could not accommodate holding a corporate body liable for manslaughter and homicide as the case may be. Meanwhile, the legislative arm of government; the sixth assembly had taken steps to address this and a Corporate Manslaughter Bill was proposed by Chris Anyawu and Yakubu Dogara, of the Senate and House of Representatives respectively. Hence, the emergence of the Corporate Manslaughter Bill 2010, fashioned on the United Kingdom's Corporate Manslaughter and Corporate Homicide Act 2007.

However, almost a decade after Dana, the Bill has not been passed into law as the Nigerian President, Muhammadu Buhari declined presidential assent to the Bill on 9 July, 2018 on the ground of its inconsistency with the provisions of the 1999 Constitution on the presumption of innocence. The focus of this article is to analyse the provisions of the Bill *vis a vis* its purpose which is to provide a legal framework for holding corporate bodies criminally liable for deaths caused by corporate activities. In addition, it discusses the constitutionality of the Bill as it is, in the context of the refusal of presidential assent. The article concedes that there are loopholes in the Bill, which will cause challenges to its implementation and effectiveness if eventually passed (especially as its "principal" the UK Act has not proved to be a successful model for holding corporations criminally liable for deaths). However, it argues that the Bill is consistent with the provisions of the 1999 Constitution, contrary to that alleged by the Nigerian President. Thus, this article suggests that the Bill be re-worked with more effective parameters, in order to achieve its ultimate aim of providing a legal framework for corporate liability for homicide.

Corporate homicide is a global reality, but Nigeria is a peculiar case

The issue of corporate homicide is one that is global and perhaps inevitable.[1] This is because the growing increase in technology, industrialisation and global population means there is a growing interaction between humans and corporations, often leading to harm to both. The harm done to the corporation can be in the form of fraud to it, while the harm to humans can be injury or death because of unsafe goods and services. Countries across the globe have recorded incidences of death caused by the activities of corporations: from the United States of America to the United Kingdom, from Malaysia to Australia, and from Bangladesh to Nigeria.[2]

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[1] Khairat Oluwakemi Akanbi, 'The Legal Framework for Corporate Liability for Homicide: The Experience in Nigeria and the United Kingdom' (2014) 22 No 1 IIUM Law Journal 117

[2] Ibid.

In 2019, the world was thrown into mourning by the crash of an Ethiopian airline Boeing 737 Max8, which killed one hundred and fifty seven people of more than thirty nationalities.[3] Earlier in the year, the same Boeing 737 Max aircraft had crashed in Singapore, which led in March 2019 to the country suspending the operation of all variants of the Boeing 737 Max aircraft.[4] On 21 February 2021, a Nigerian air force plane crashed in Abuja, the nation's capital, five minutes after take-off, killing all on board.[5]

Earlier in 2014, a South Korean ferry with more than four hundred people *en route* a tourist resort island sank on April 16, which led to the death of more than three hundred people.[6] The Esso gas plant explosion in 1998 killed two people in Longford, Victoria, Australia.[7] In the United States of America, the BP refinery exploded in 2005, causing the death of fifteen people. The sinking of the *Herald of Free Enterprise* in 1987, which killed one hundred and ninety three people, and the King's Cross Station fire in 1997, which killed thirty-one people are some of the incidences of corporate homicide in the United Kingdom. In 2013, Bangladesh experienced what has been described as the deadliest garment factory accident ever,[8] when an eight storey commercial building collapsed in the greater Dhaka area in Bangladesh killing more a thousand people and leaving several others injured. Some of these incidents have provoked discussion and law reform of the criminal liability of corporations for homicide. It was the collapse of *The Herald of Free Enterprise* in the United Kingdom, and the following unsuccessful prosecution for manslaughter, that led to the eventual passing of the Corporate Manslaughter and Corporate Homicide Act 2007. In the same vein, the Westray accident, which killed twenty-six people, and the unsuccessful attempt at prosecuting the corporation, that influenced the introduction of Bill C45 in Canada.[9] In addition, Australia has undergone law reforms in the area of corporate criminality.

Yet, in Nigeria, corporations still escape liability for deaths because the existing legal framework cannot accommodate corporate liability for homicide. In addition, the fact that Nigeria is a developing country means many of its experiences of corporate homicide are unreported because of ignorance, poverty and the influence of religion.[10] The influence of religion is hinged on such beliefs, as the devil is responsible or influences deviant behavior in people, illness and deaths are punishments from God, and everything happens based on the will of God. These beliefs mean victims of crime do not report or seek for justice.

Despites its abundant human and natural resources, the country is one of the poorest countries in the world. It has been reported that forty per cent of Nigerians live below the poverty line, and that more than eighty-two per cent of Nigerians live below one dollar per day.[11] The implication is that people are too poor to report and take steps to monitor the prosecution of corporations who are often rich and powerful entities. More so, they may be

[3] https://www.aljazeera.com/news/2019/03/ethiopiam-airlines-flight-nairobi-crashes-deaths-reported-190310082515738.html accessed 26 March 2020

[4] www.bbc.com>world-asia-47534292 accessed 18 February 2021

[5] http://www.bbc.com/news/world-africa-56145992 accessed 20 February 2021

[6]www.nbcnews.com/storyline/south-korea-ferry-disaster accessed 25 June 2014 www.theguardian.com/world/2014/may/15/south-korea-ferry-captain-charged-manslaughter accessed 11 August 2014

[7] See *DPP v. Esso Australia Pty Ltd* (2001) SC/Victoria.

[8] www.bbc.uk/news/world-asia-22635409 accessed 3 May 2013

[9] Amanda Pinto and Martin Evans, *Corporate Criminal Liability* (Sweet & Maxwell 2003) 226

[10] Although the country has no State religion, it is a multi-religious society where three major religions are recognised.

[11] Report released by the National Bureau of Statistics covering the period between September 2018 to October 2019 See www.aljazeera.com accessed 10 January 2021.

influenced when offered a token by powerful corporation in exchange for keeping quiet about the crime.

The menace of fake foods, drugs and substandard services has contributed greatly to the incidences of corporate homicide in Nigeria. According to Dora Akunyili, erstwhile Director General of the National Agency for Food, Drugs Administration and Control (NAFDAC), the menace of fake and substandard drugs had been killing Nigerians as early as the 1970s. She cited an incident when Nigeria donated meningitis vaccines to the Niger Republic and the vaccines were later detected to be counterfeits after approximately 600,000 people had been vaccinated with it.[12] At the time, fake drugs worth about sixteen million dollars were recovered by the NAFDAC.[13] The infiltration of fake drugs into the Nigerian drugs market was made easier by the endemic corruption in the country, which makes it easy for manufacturers of fake drugs to escape the law; this is an inducement to continue to perpetrate the illegality.[14] Similarly, more than eighty children were killed as a result of taking an adulterated teething drug. As a result of the outcry, the pharmaceutical company was prosecuted for violating a regulatory offence, as the legal framework could not sustain prosecution for manslaughter.[15] Generally, the Nigerian legal framework does not support corporate criminal liability beyond strict liability regulatory offences,[16] thus the existing homicide legislation is unsuitable for prosecuting corporations.[17]

Nigeria has experienced more than forty mainly avoidable plane crashes from 1960 to 2019.[18] Yet, the airlines escape criminal liability as none of them was prosecuted for the deaths. Thus, the crash in June 2012 of a commercial plane, operated by Dana airlines in Lagos Nigeria and killing more than one hundred and fifty people, was one crash too many.[19] There was a large outcry and public condemnation of the crash. In particular, there were complaints by passengers who had flew the plane shortly before the crash that the plane had had near crash experience earlier.[20] Thus, defining a framework for holding corporations liable for homicide became inevitable. More so, a year after, in October 2013, another plane owned by Associated Airlines crashed minutes after take-off in Lagos, killing sixteen people on board.[21]

Defining corporate homicide

[12] Bulletin of the World Health Organisation, (Vol 84, No 9, September 2006) 685-764 www.who.int>bulletin>volumes accessed 18 February 2021.
[13] Ibid.
[14] Nigeria's corruption rating according to Transparency International Corruption Index has been poor.
[15] *Adeyemo Abiodun v. F.R.N* (Unreported) Suit No CA/L/550/M/2013. Decided by the Federal High Court Lagos, on 17 May 2013.
[16] See Khairat Oluwakemi Akanbi, 'Corporate Criminal Liability as a Catalyst for Effective Anti-Corruption Law in Nigeria' (2018) vol. 3 No1 KIU Journal of Humanities.
[17] Khairat Oluwakemi Akanbi, 'The Legal Framework for Corporate Liability for Homicide: The Experience in Nigeria and the United Kingdom' (2014) 22 No1 IIUM Law Journal.
[18] https://www.channelstv.com/2013/10/04/timeline-of-plane-crashes-in-nigeria/- accessed 27 April 2020
[19] Vanguard Newspapers 21 July 2012.
[20] See also, Khairat Oluwakemi Akanbi, 'Corporate Criminal Liability: Towards Regulating Corporate Behaviour Through Criminal Sanctions in Nigeria' (2015) PhD thesis Ahmad Ibrahim Kulliyyah of Laws, International Islamic University, Malaysia.
[21] www.channelstv.com/home/2013/10/03/updateprivate-aircraft-crashes-near-lagos-depot/ accessed 7 January 2014.

Homicide simply means when a person kills another person. It includes murder, manslaughter and infanticide.[22] It is regarded as the most grievous crime as a result of the belief that life is sacred and the belief that only the giver of life should take it.[23] Thus, corporate homicide will simply mean when a corporation as a "legal person" kills another person.[24] However, as a result of the peculiar personality of corporations, a number of questions need to be answered in determining what qualifies as corporate homicide. First, what class of homicide qualifies as corporate homicide? Will it be murder, manslaughter or infanticide? Second, how can a corporation, as an artificial person, kill another person?

First, the Latin maxim *actus non facit reum nisi mens sit rea* is the basis for criminal liability. The *actus reus* for manslaughter and murder is the same, which means that a life must have been lost as a result of the act or omission of another. With respect to infanticide, there is a little variation as the life that must have been lost must be that of an infant under the age of twelve months. The difference between murder and manslaughter is in the *mens rea,* known as malice aforethought.[25] Thus, a murder is said to have occurred when a person kills another with malice aforethought. In the same vein, manslaughter occurs when a person kills another without malice aforethought.[26]

Manslaughter has been described as the most complex form of homicide because it is quite wide-ranging, from voluntary manslaughter when a person seemed to have the mental element for murder but killed in circumstances recognised by law, to involuntary manslaughter when a person lacks the necessary intention but still committed the *actus reus* of killing. Manslaughter also includes gross negligent manslaughter, which is when a person is negligent in the discharge of a lawful activity leading to death. In *R v. Adomako*,[27] the House of Lords provided an exposition of what constitutes involuntary manslaughter and held that in proving involuntary manslaughter, there must be a duty of care that must have been breached as a result of negligence leading to loss of life.

With respect to corporate homicide, death occurs as a result of corporate activity and the corporation is responsible for the death and not individual members of the corporation. Thus, the death must have been because of a systemic breakdown within the corporation. A corporation by virtue of incorporation or registration is ordinarily formed for lawful purposes.[28] Thus, when death occurs as a result of corporate activity, it is usually as a result of negligence and not because the corporation was pre-meditated or had malice aforethought. Thus, corporate homicide occurs when in the course of doing its legitimate business; a corporation is negligent leading to loss of lives. Hence, corporate homicide qualifies as a form of gross negligence manslaughter.

Justification for corporate criminal liability for homicide

[22] C.M.V Clarkson, H.M. Keating and S.R. Cunningham, *Criminal Law* (7th edn, Sweet and Maxwell 2007), 660.
[23] Ibid, page 662.
[24] The case of *Salomon v. Salomon & Co Ltd* [1897] AC 22 has already settled the personhood of a corporation in the eyes of the law.
[25] Ibid, page 665. That the term "malice aforethought" has undergone reform under the English Law, from intention to kill to intention to cause grievous bodily harm. See *Hyam v. DPP* [1975] AC 55.
[26] See the Supreme Court of Nigeria's decision in *Festus Amayo v. State* (2002) SCM 169.
[27] *R v. Adomako* [1955] 1 AC 171.
[28] C.M.V Clarkson, 'Context and Culpability in Involuntary Manslaughter: Principle or Instinct?' in Ashworth and Mitchell (eds), *Rethinking English Homicide Law* (2000), 152.

As stated above, corporate homicide qualifies as a form of gross negligence manslaughter. It might be asked why should there be a legal framework for corporate liability for homicide since, in actual fact, a corporation is only an abstraction who can do nothing for itself except through its natural persons; thus, why not hold the culpable officer or member of a corporation liable? The justification for corporate liability as opposed to individual liability lies in the very nature of the act or omission leading to death. In essence, the justification lies in the nature of the "killing" itself. Thus, corporate homicide occurs when the act or omission leading to death is caused by the systemic breakdown or misconduct of a corporation and the corporation is indeed the blameworthy person and not an individual member or officer of a corporation.[29]

Another argument could be that considering the peculiar nature of corporations as artificial persons and the "definition" of corporate homicide as a form of gross negligence manslaughter, it is not necessary to "punish" the corporation through the instrumentality of the criminal law, since the corporation is primarily formed for a lawful purpose. However, another justification for criminalising corporate homicide is the fact the societal quest for justice is better served through the criminal law than the civil law. Besides, homicide is a crime, a grievous crime because the sanctity of life should ordinarily be preserved. In addition, the fact of legal personality itself is a justification for criminalising corporate homicide. The recognition of a corporation as a person in law means it is recognized as a rights- and duty-bearing entity whose acts and omission can constitute a crime.[30] Finally, the increasing rate of corporate deaths makes it imperative that it should be brought into the realm of the criminal law even if only for deterrence purposes. One of the goals of sanction that is the consequence of crime and criminality is deterrence, which may be specific or general deterrence.[31]

The Corporate Manslaughter Bill 2010

The Bill initiated simultaneously in the upper and lower legislative arm of the Nigerian government by Chris Anyawu and Yakubu Dogara respectively, is to provide for corporate manslaughter and corporate homicide and incidental matters. It is a short piece of legislation with twenty-six chapters. The Bill is fashioned after the UK's Corporate Manslaughter and Corporate Homicide Act 2007 and thus shares many similarities with the Act. The provisions of the Bill will now be examined.

The Offence

The Bill creates an offence when death occurs because of the way the activity of an organisation is managed or organized and as a result of which there had been a breach of a duty of care by the organisation to the deceased. It further provides that an organization can only be guilty of the offence if the way in which its activities are managed by its senior management is an important factor in the breach of the duty of care.[32]

From the definition of the offence, the organisation must owe the deceased a duty of care, which must have been breached, thus suggesting that there must have been some form of

[29] Khairat Oluwakemi Akanbi, 'The Legal Framework for Corporate Liability for Homicide: The Experience in Nigeria and the United Kingdom' (2014) 22 No 1 IIUM Law Journal 118, 119.
[30] K.O. Akanbi and D.A. Ariyoosu 'Corporate Criminal Liability: Imperatives of Criminalizing Corporate Wrongs' (2014) 9 UILJ 190.
[31] Ibid page 195.
[32] Section 1(3).

relationship between the organisation and the deceased. Most importantly, there must be a nexus between the senior officers or managers and the corporate activity resulting in death. It seems that creating a nexus between the senior management and the activity constituting the crime is a subtle endorsement of the identification theory or perhaps the management failure theory of determining the corporate *mens rea*.[33] Thus, there is bound to be challenges to applying the theories. First, in large corporations, the senior management, who are often the directors, are usually disconnected from the corporate activity constituting the crime. Thus, hinging corporate fault on the nexus may mean that the successful prosecution of large organisations will be a mirage. Besides, where will the managerial powers in large corporations with branches be located? Another limiting factor is that the senior management might, as is often the case, delegate managerial duties, making it difficult to establish the nexus. Thus, delegation of managerial duties and the extent of delegation are likely challenges.[34] Another limitation is the likely injustice to a corporation when corporate activity is managed negligently, but contrary to corporate policy.

The meaning of relevant duty of care is given in s.2 as duties owed under the law of negligence, which covers duties to employees, agents, occupier of premises, and duties owed in connection with the supply of goods and services. Briefly, these are duties owed by virtue of the old common law principle established in *Donoghue v. Stevenson*[35] on the basis of the neighborhood principle. The broad definition of relevant duty of care is commendable, as it places a responsibility on corporations with respect to all those that can be affected by corporate activities: employees, agents, consumers and members of the general public. It is also provided that, what qualifies as a relevant duty of care is a question of law that is determinable in court.

However, some categories of duty are exempted from qualification as relevant duty of care within the meaning given in the Bill. For example, s.3 exempts any duty of care owed by a public authority in respect of a decision as to matters of public policy. Similarly, a duty of care owed in respect of actions done while exercising an exclusively public function are qualified, as such will not be regarded as a relevant duty of care unless it is in respect of employees, a duty owed as occupier of premises, or owed to one for whom the organisation is responsible for its safety.[36] Military and policing activities are also qualified with respect to the meaning of relevant duty of care, as certain actions done in specific instances will be exempted from the relevant duty of care rule.[37]

The mens rea

The greatest challenge to the development of corporate criminality has been the *mens rea*. This is because of the peculiar nature of a corporation as an artificial person that is not

[33] The identification theory also known as the alter ego theory was originally developed as a civil law principle in the case of *Lennards Carrying Co Ltd v. Asiatic Petroleum Co Ltd* (1915) AC 705 HL and it identifies certain categories of people within the company as the alter ego of the company. The alter ego is not treated as the agent of the company but as the company itself as it is the embodiment of the company. This principle is influenced by the fiction theory of the corporation. The management failure theory is the theory developed by the UK's Corporate Manslaughter and Corporate Homicide Act 2007 and hinges the company's *mens rea* on the senior management of the company.
[34] C. Wells, *Corporations and Criminal Responsibility,* (2nd edn, Oxford, Clarendon Press, 2011)98 See the conflicting judgements in *Meridian Global Funds Management Asia Limited v. Securities Commission* (1995) 2 AC 500 JCPC and *Attorney General's Reference No2* (1999) (2000) 2 Cr. App. R. 207.
[35] [1932] AC 562 1.
[36] Section 3.
[37] Sections 4 and 5.

capable of emotion, and the fact that the criminal law is founded on the principle of *actus non facit reum nisi mens sit rea.* Therefore, any attempt at defining corporate homicide must necessarily include the yardstick for determining corporate *mens rea*. The Corporate Manslaughter Bill has adopted the management failure model developed in the UK's Corporate Homicide and Corporate Manslaughter Act 2007 as the attribution model for determining the corporate *mens rea*. It provides in s.1(3) that an organisation will only be guilty of the offence if the way its activities are managed by its senior management is an important element of the breach of the duty of care. Thus, the *mens rea* necessary for manslaughter will be found in the senior management's conduct. In simpler terms, the organization's mental element is evident in how the members of management behave, and the corporate *mens rea* lies in the actions of the senior management.

While the attempt to adopt a corporate *mens rea* is commendable, it must be stated that the management failure model adopted is not the most suitable and thus will affect the efficiency and efficacy of the Bill when and if it is eventually passed into law. First, the management failure model is derivative and at variance with the core of the criminal law, which is based on individual liability. The idea model for corporate criminality is individualistic and based on personal fault. Second, the management failure model developed in the UK to cure the challenges of the identification model is still tied to the apron strings of the identification model. It has been submitted that the management failure model is merely a qualified form of the identification model.[38] Thus, it is inevitable that with time it will become saddled with some if not all the challenges that the identification model has faced. Indeed, it can be argued that the difference between it and the identification model is simply a matter of semantics, as the senior management is no other than the director(s).

Thematic application and jurisdiction

With respect to geographical jurisdiction, the Bill, being an Act of the National Assembly, has a national application and applies to all parts of the country. In fact, s.18 gives further clarification to the extent or definition of the geographical application, which includes the seaward limits of territorial sea adjacent to Nigeria or on a Nigerian controlled aircraft, hovercraft or ship, even when the person is no longer on board as a result of a mishap. It also applies to any place to which the Petroleum Act applies.

Also, its thematic application is also wide as it applies to organisations who are ordinarily not incorporated companies such as the police, the army, partnerships, trade unions, employers' associations, government agencies and departments in the same way as if they are incorporated companies. Hence, the word 'organisation' is used and not corporation, since the focus is wider than incorporated corporations. Another positive highlight with respect to the application of the Bill is s.13(1), which provides that any statutory provision on a criminal proceeding against a corporation shall be applicable to the police, government departments, partnerships, trade unions and employers associations with necessary modifications. It seems to proactively extend the definition of corporation for the purpose of corporate manslaughter. This is commendable, as it will prevent likely prosecutorial confusion with respect to past or future legislation on the extent of its application.

While the wide geographical and thematic application is commendable, the fact that individual accessorial liability is excluded is a deficiency of the Bill. Section 16 excludes individual liability for aiding, abetting or being a party to corporate manslaughter. This

[38] J Gobert, 'The Corporate Manslaughter and Corporate Homicide Act 2001: Thirteen Years in Making but was it Worth the Wait?' (2008)71 MLR 413, 428.

deliberate exclusion can in fact be fatal to the efficiency of the Bill. This is because directors are excluded from liability as accessories. Yet, the reality of corporate practice is that directors as managers and administrators of companies are often complicit in corporate crimes and criminality.[39] Not surprisingly, however, this exclusion is similar to s.20 of the model Act, the UK's Corporate Manslaughter and Corporate Homicide Act, which has also been criticised as immunising corporate officials from liability that hitherto existed under the common law.[40] The discretion enjoyed by directors in the management of corporate affairs suggests that they are in a position to influence a culture of compliance and good behaviour in the company. Besides, the post- crime reaction to situations can also suggest culpability as accessories after the fact. Thus, individual, specifically director's', liability as accessories can further enhance the efficiency of the Bill.

Sections 14(1) and (2) is also commendable as it recognises transfer of liability. While the concept of transfer of liability might be alien to the criminal law, it is appropriate in this context based on the peculiarity of the corporation as an artificial person. It provides that where death occurs as a result of the activity of a public organisation and such organisation has its functions transferred to another organization, the new organisation shall inherit the liability of the original organization even if such change in organizational functions took place in the course of proceedings under the Bill. This provision succinctly captures the reality of the workings of government departments and agencies especially in Nigeria, which is fraught with policy change almost as frequent as change in government.

However, the requirement that the consent of the attorney general is required can be a clog in the wheel of prosecutorial success. Section 15 makes it mandatory for the consent of the Attorney General to be sought before a criminal proceeding can be instituted. This requirement can cause delay because of the inevitable administrative bottlenecks. Besides, this can add to the already bloated powers of the office of the Attorney General, already described as a law unto himself.[41] Thus, the provision of s.15 is unnecessary.

Also commendable is the fact that a prosecution under the Bill does not preclude a prosecution under health and safety legislation if the circumstances so determine. Section 17(1) provides:

> "Where in the same proceedings there is-
>
> a) a charge of corporate manslaughter arising out of a particular set of circumstances,
> b) a charge against the same defendant of a health and safety offence arising out of some or all of those circumstances, the court may, if the interests of justice so require, return a verdict on each charge"

It further provides in s.17(2) that an organisation that has been convicted of corporate manslaughter may in the interest of justice be charged with a health and safety offence arising out of all or some of the circumstances.

Sanctions

[39] Khairat Oluwakemi Akanbi, 'Director's Accessorial Liability: A Tool for Effective Regulation' (2018) 16 MLJ 99, 109.
[40] Neil J. Foster, 'Individual Liability of Company Officers' From the Selected Works of Neil J. Foster, September 2009 http://works.bepress.com/neil_foster/34 accessed 27 July 2014
[41] *State v. Ilori* (1983) 1SCNLR 94.

Like most other Nigerian legislation with respect to corporate wrongs, fines are the main sanction recognised in the Bill.[42] This is however not peculiar to Nigeria as a fine is the most common corporate sanction in most jurisdictions globally. This is probably because of the artificial nature of a corporation with no body to imprison, thus the reasoning that corporate sanction will always be financial especially as corporations are usually formed for profit purposes. However, as common and "suitable" as fine is as a corporate sanction, it is not without its flaws. One of which is that it can be built into the normal cost of doing business and the consuming public ultimately pay the price for it.[43] Hence, the proposition for the introduction of equity fine - when a corporation is made to issue shares to a victim's compensation fund, thus cash is not removed from the corporation - is justified.[44]

In addition, it confers power on the court to make orders as to remedying the wrong and an order of publicity. Section 8 empowers the court to make a remedial order upon application by the prosecutor stating the terms of the proposed order. Such remedial order may be to remedy a breach or a state of affairs resulting from a breach. It may also be to remedy a health and safety deficiency or a particular policy or practice of the organisation. It is also required that before making an application for a remedial order, the prosecutor must have consulted with relevant enforcement authorities under whose supervision the remedy may be effected if eventually ordered by the court.[45] It should be noted however that the decision whether to order a remedy or not is entirely at the discretion of the court upon consideration of the proposal by the prosecutor and considering the available evidence. The remedial order is a good innovation as it has the effect of preventing future wrongs if the prevailing circumstances are remedied. However, with respect to the instant wrong, it cannot be remedied, as death cannot be remedied.

Section 9 provides for an order of publicity, entailing the court giving an order to a convicted organisation that it should make a publication stating: the terms of the offence committed; the fact of conviction and the amount of fine; and the terms of the remedial order made if any. It also provides that the court in determining whether to order publication must seek the views of an enforcement authority. The publicity order has been described as an effective sanction that can achieve the deterrence goals of sanction.[46] It can affect the public perception of an organization, thereby leading to loss of reputation.

Generally, the attempt to extend corporate liability to homicide it is commendable, as it will ensure that corporations take more stringent care with respect to their safety standards and generally enhance a culture of compliance. It is also suggestive of the government's responsiveness to social reality since the Bill was introduced as a result of public outcry. Yet, the approach adopted in the Bill may well be an exercise in futility. This is because the Bill is an adoption of the UK's Corporate Manslaughter and Corporate Homicide Act 2007, which itself has not proved to be a successful model for corporate liability for homicide. The management failure model developed in the Act as a means of determining the corporate *mens rea* is suitable for small corporations. The pattern of conviction following the Act in the UK has shown that most of the convictions were of small corporations,[47] and

[42] Section 1(5).
[43] Linus Ali, *Corporate Criminal Liability in Nigeria* (Malthouse Law Books 2008) 292.
[44] See generally Robert Baldwin, Martin Cave and Martin Lodge *Understanding Regulations, Theory, Strategy and Practice* (2nd edn, OUP 2011) 250.
[45] Section 8 (3) and (4).
[46] Linus Ali, 295.
[47] The first conviction under the Act was that of a small one-man company: *R v. Cotsworld Geotechnical Holdings Ltd* (2011) ALL ER (D) 100. See also *R v. Lion Steel Equipment* (Unreported) July' (2012) Crown

not large multinationals and or even government agencies.[48] It does not reflect the essence of the reality of modern corporate operations that is hinged more on systemic structure than on acts of individual officers of the corporation. Thus, in most instances, the corporate officials are disconnected from the acts constituting the offence.

In addition, management failure is a derivative model since corporate *mens rea* is based on the fault of corporate officials. This fact suggests that even if the Act were successful in prosecuting large corporations, it will not stand the test of time. A derivative model contradicts the very foundation of corporate criminal liability, which is the concept of corporate personality. Basing the *mens rea* of a corporation, which is a legal person, on individual(s) who is another legal person, suggests that the legal personality of a corporation is a hoax. Besides, personal liability is the hallmark of the criminal law. Thus, any attempt at introducing derivative liability into the criminal law will be a contradiction.[49] In addition, the management failure model contained in the Bill and its principal, the UK Act, is likely to pose some of the evidential challenges of the identification model. For example, s.1(4)(c) of the Bill defines senior management in as persons who play significant roles in:

> "(i) the making of decisions about how the whole or substantial part of its activities are to be managed or organized, or (ii) the actual managing or organizing of the whole or substantial part of those activities…"

Thus, evidential issues of what qualifies as a substantial part of an organisation's activities, and what qualifies as a significant role, are some of the challenges that may arise if the Bill is passed and finally gets tested. In addition, there is the need to expand the sanctions and introduce more suitable and contemporary sanctions. Further, the financial sanction of fine as it stands needs to be modified to the nature of equity fine in order to be effective as a corporate sanction.

The constitutionality question

As stated above, the reason given for the refusal of Presidential assent is that the Bill as it is, is unconstitutional and violates the constitutional provisions on the presumption of innocence. Section 36 of the 1999 Constitution[50] is part of the fair hearing provisions of the Constitution and provides in (5) that everyone charged with a crime shall be presumed innocent unless the contrary is proved, except in situations whereby any law imposes the burden of proving particular facts on the person.[51] Similarly, the presumption of innocence provisions is equally embedded in the Evidence Act,[52] to the extent that the burden of proving the guilt of the accused is on the prosecution and such must be proved beyond reasonable doubt. Thus, the yardstick for criminal culpability will be that the prosecution

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Court (NI); *R v Prince Sporting Club* (Unreported) (2013) Crown Court Southwark; *R v Mobile Sweepers (Reading) Ltd* (Unreported) (February) 2014 Crown Court Winchester; and *Health and Safety Executive v Huntley Mount Engineering Ltd* (Unreported) July, (2015) Crown Court Manchester.

[48] *R v CAV Aerospace Limited* (Unreported) July, (2015) Central Criminal Court involved a large company with more than 400 employees. A parent company was convicted when an employee of its subsidiary was crushed by stacks of aircraft grade metal billets.

[49] However, it must be stated that derivative liability is not novel to the criminal law as vicarious liability is recognized in strict liability offences. Yet, the application of vicarious liability in strict liability offences has been condemned and strict liability offences are often referred to as quasi crimes.

[50] As amended.

[51] The requirement of presumption of innocence is in fact a global one as there are international instruments endorsing the same. An example is Article II of the Universal Declaration of Human Rights 1948.

[52] Section 135 Evidence Act 2011, Cap E14 LFN 2004.

must establish that the accused actually committed the offence; otherwise, the accused will be acquitted. It has been held that the purpose of the Constitution is to safeguard the interest and ensure that accused persons are given a fair trial.[53] Thus, the presumption of innocence requirement is not to forestall criminal culpability, but merely to enhance justice and make sure an innocent party is not wrongly convicted.[54]

There is nothing in the Corporate Manslaughter Bill that forecloses the presumption of innocence or shifts the evidential burden. First, from the definition of the offence, the offence is committed when the way in which an organisation is managed amounts to a breach of a duty of care and causes a person's death. It goes further that an organisation is guilty only if the way that the activities are managed is a major element in the breach of duty of care. There is nothing in the Bill that says that the gross breach occasioned by the management of the organisation must not be proved beyond reasonable doubt, or shifting the burden of proof to the accused organisation. Furthermore, the Bill provides that the question of whether an organisation owes the deceased a duty of care is a question of law, which the court must make findings on, based on the evidence before it. Thus, this further strengthens the presumption of innocence requirements rather. Presumption of innocence merely applies to give the accused a reasonable benefit of doubt considering the context of the case.[55] Therefore, the refusal of presidential assent because it is a violation of the constitutional requirements of presumption of innocence cannot stand.

Conclusions and recommendations

The Bill, though long overdue, may turn out to be an exercise in futility. The reality of contemporary times is that there is a need to hold corporations criminally liable for deaths that occur from corporate activities as a result of the inevitable growing interaction between corporations and humans. This attempt at creating a legal framework in Nigeria took a long time in coming, but on closer examination shows that it seems like taking steps to nowhere, because the purpose of the legal intervention cannot be fully achieved under the Bill as constituted. Thus, there is the need for a reworking of the Bill with the right parameters that will ensure its effectiveness and efficiency.

It is recommended that the management failure theory of corporate *mens rea*, which is incorporated in s.1 (3) of the Bill, be replaced with the corporate culture theory. The corporate culture theory was developed in the Australian Criminal Code Act 1995 and has been described as the best theory for determining corporate *mens rea.*[56] First, it is based on personal liability and not derivative like the management failure. Second, it seems to capture the essence of modern corporate activities that is systemic and not individualistic in nature. The evidential challenges of the management failure are absent. This theory propounds that a corporation is not merely a collection of its human elements but also a set of policies, attitudes and expectations that influence the human elements in the corporation. Thus, the

[53] *Adeniji v State* (2001) NWLR pt.73/50, see also *Laoye v. State* (1995) LNWLR (pt.10) 832.
[54] See generally on presumption of innocence, Jacob Abiodun Dada and Eugene A. Opara, 'Application of Presumption of Innocence in Nigeria: Bedrock of Justice or Refuge for Felons' (2014) 28 Journal of Law, Policy and Globalization 68, 77 ISSN 2224-3259.
[55] See *Okoro v. State* (1988)5NWLR (pt 94) 255, *Onafowokan v. State* (1987) 3 NWLR (pt.61) 538 and *Garba v. State* (2011) 14 NWLR (pt 1266) 98.
[56] Jonathan Clough and Carmel Mulhem, 'The Prosecution of Corporations' in *Corporate Culture as a Basis for the Criminal Liability of Corporations* (An Allen Arthur Robinsons Report for the United Nations Special Representative of the Secretary General on Human Rights and Business 2008).

corporate culture locates the corporate *mens rea* in the corporate ethos, culture, standards and practices.

It is also recommended that director's accessorial liability should be introduced into the Bill. This is because of the vantage position that directors hold in corporations. Having directors as accessories to corporate liability will ensure a culture of compliance, as there is a higher motivation to do the right thing. Finally, sanctions should be expanded to include community service, corporate probation and equity fine.

CASE NOTES

Article 2 ECHR – right to life - inquest determination – mental health services

R (Patton) v HM Assistant Coroner for Carmarthenshire and Pembrokeshire 1377 (Admin)

Administrative Court

Facts and Decision

Aged 16, Kianna had been found hanging at a time when she was under the care of Specialist Child and Adolescent Mental Health Services with a history of self-harm. She was living with a friend, whose mother had let her use cannabis. This caused her mother (the claimant) significant anxiety, given Kianna's mental health issues. Her mother had sought assistance in relation to Kianna from social workers and police officers before her death. She believes there were serious failings in the way they responded, and in the care S-CAMHS provided to Kianna. Following the Coroner's ruling that Article 2 ECHR was not engaged, a disclosed Health Board's report identified several issues with care delivery and the way that Kianna's risk had been assessed, in particular noting that safeguarding screening had not been completed once it was identified that she was no longer living at home.

Mrs Justice Hill referred to the decision in *R (Morahan) v West London Assistant Coroner* [2021] EWHC 1603 and the 'distillation' of relevant principles by Popplewell LJ at [122] namely:

> (1) There is a duty on the state to investigate every death. This is part of its framework duty under Article 2 ECHR by way of a positive substantive obligation. This duty may be fulfilled simply by identifying the cause of death. It may require further investigation and some explanation from state entities, such as information and/or records from a GP or a hospital.
>
> (2) In certain circumstances there is also a distinct and additional enhanced duty of investigation that requires the scope of the investigation to have the minimum features summarised by Lord Phillips in [*R (Smith) v Oxfordshire Assistant Deputy Coroner* [2010] UKSC 29, at paragraph 64. In this country, the enhanced investigative duty is usually, but not always, to be fulfilled by a Middleton request
>
> (3) The enhanced investigative duty is procedural and parasitic on a substantive duty. It cannot exist where there is no substantive duty.
>
> (4) The circumstances in which an enhanced investigative duty, as a procedural parasitic duty, arises: (a) whenever there is an arguable breach of the state's substantive Article 2 duties, whether the negative, systemic or

positive operational duties; and (b) in certain categories of circumstances, automatically.

Mrs Patton relied on [4] (a), namely, that there was an arguable breach of the state's systemic duties and referred to the statutory context concerning 'looked after children'. That context was in particular the duties under s.76 (1) (c) of the Social Services and Well-being (Wales) Act 2014. This was to provide accommodation where the person who had been caring for the child was prevented from providing suitable accommodation or care. In addition, under s.76 (3) to provide accommodation for any child within its area who has reached the age of 16 and whose well-being the authority considers is likely to be seriously prejudiced if it does not provide the child with accommodation. Mrs Justice Hill referred to a number of relevant cases concerning the systemic duty in the healthcare duty: essentially being a duty to have appropriate administrative and regulatory systems in place, which should in turn provide an effective system of rules, procedures, guidance and control.

Mrs Patton argued that the Local Authority had information about Kianna staying at the friend's house without her mother's consent and that she was being allowed to take some cannabis there. Accordingly, it was arguable that the Local Authority had a statutory duty to accommodate Kianna. Had such accommodation been provided, Kianna would have become a 'looked after' child, and the Local Authority would have had concurrent parental responsibility, with duties to safeguard and promote her wellbeing and to implement a care and support plan following a medical assessment. Mrs Patton's core submission was, therefore, that it was arguable that there was a failure to take the steps the Council ought to have taken, which would have meant that it exercised a significant degree of control over a most vulnerable child who had proven to be a suicide risk. That relationship, it was argued, is sufficient to engage the general duty under [Article 2] and indicates state responsibility in Kianna's death. Mrs Patton went on to outline a number of alleged specific breaches of the systemic duty.

The Council relied on the decision in *R (Parkinson) v HM Senior Coroner for Kent* [2018] EWHC 1501, and, in particular, argued that Kianna's case was not one that involved a breach of the general duty. There clearly were systems in place. In a wide sense, there was a regulatory framework created and imposed by the state to which the Council was subjected. In a narrower sense, the Council's Children Services teams had engaged with Kianna and her family pursuant to their statutory obligations, in the context of the active involvement of other agencies, including S-CAMHS, the Police, and Kianna's school, college and GP.

The specific breaches relied on by Ms Patton were denied, but in any event it was submitted that they were, at their highest, examples of individual and not systemic failings, and were thus outwith Article 2 ECHR. The Health Board relied on the fact that Kianna was neither detained under the Mental Health Act 1983, nor a voluntary in-patient at the time of her death. It also submitted that Article 2 had not previously been held to be engaged in an inquest on the basis of an arguable breach of the general duty, where the person was living in the community and able to function to a reasonable level, that is to continue with studies and work, as Kianna was.

Mrs Justice Hill began her substantive judgment by holding at [87] that it was appropriate and not premature to challenge the Coroner's ruling that Article 2 was not engaged by way

of judicial review even where it was expressly stated to be provisional and that it would be kept under review:

> If the ruling is wrong in law, it is more sensible for it to be corrected now, so that the inquest can proceed on a proper basis, in accordance with general public law principles.

She went on at [103-105] to hold that issues around assumption of responsibility, vulnerability and matters of that nature were more pertinent to the triggering or existence of the operational duty than the general duty. At [106] she referred to the formulation of the general duty in *Morahan* and held that it did:

> … not require that the element of the state in question has assumed responsibility or exercised control over an individual, or that they are particularly vulnerable: rather the focus is on ensuring that the state, through a range of entities, has in place an adequate legislative and administrative framework for the protection of life. In the healthcare context, the general duty was described in Morahan at [30(2) (a]) as simply requiring "effective administrative and regulatory systems". Again, no reference was made to assumptions of responsibility or particular vulnerability.

Mrs Justice Hill then held at [115-119] that the Coroner's approach to whether there had been a failure to provide accommodation had been flawed as he had failed to conduct his own assessment as to whether Kianna should have considered to be a 'looked after' child. Further, his decision that the general duty was not engaged was flawed, as a breach of the duty to provide accommodation was not an essential element of the existence of the general duty. Further, she held at [125-129] that the Coroner had failed to give sufficient reasons for finding that there was no obligation on the Local Authority to provide accommodation, either by virtue of a lack of accommodation or because her well-being was likely to be seriously prejudiced:

> Here, the Coroner simply re-stated the statutory test … saying, "no obligation to provide accommodation arose because … Kianna's well-being was likely to be seriously prejudiced". Thus, he gave no reasons for his decision that no obligation arose. The main, if not the only, point advanced by Ms Patton was that accommodation where Kianna was permitted to smoke cannabis, despite her mental health issues, would self-evidently seriously prejudice her well-being. Accordingly, this was the "principal important controversial issue" and it was therefore incumbent on the Coroner to explain, even in brief terms, how he had resolved it.

Accordingly, the Coroner's ruling was quashed, and the decision was remitted for a fresh ruling as to whether Article 2 ECHR was engaged.

Commentary

Mrs Justice Hill's quashing of a ruling that the Article 2 general (or systemic) duty had not been potentially engaged by the death of Kianna Patton is significant in terms of imposing strict duties on health authorities for protecting individuals from self-harm. This case is also useful in illustrating the importance of interested parties (and coroners) being clear about

the precise basis for an Article 2 inquest. In particular in distinguishing between the principles underpinning the imposition of an operational duty from those of a systemic duty, as well as between instances of potential breaches from the factual matrix supporting a possible engagement of the systemic duty.

Dominic Ruck Keene, Barrister, 1 Crown Office Row

Electoral Law – Voter Identification – Pilot Schemes – Right to Vote – Representation of the People Act 2000 – Elections Act 2022

R (on the application of Coughlan) v Minister for the Cabinet Office [2022] UKSC 11

Supreme Court

Background

In April 2022, the UK Supreme Court had the final say in a three-year long legal battle concerning the implementation of a "pilot scheme" in the 2018 local elections. This scheme required voters in Braintree to show identification when voting in polling stations, in light of the Government's objective to roll out voter identification requirements nationwide. The focus of this judicial review concerned the scope and interpretation of section 10 of the Representation of the People Act (RPA) 2000, which authorises the Secretary of State to make subordinate legislation to implement pilot schemes for local elections in England and Wales. Under this provision, a pilot scheme can be implemented to make alternative arrangements for elections in respect of "when, where and how voting…is to take place" (s.10(2)(a)), with the main issue for the courts being whether the requirement for voters to show identification fell within the scope of "how" voting is to take place. Dismissing the applicant's appeal against the Court of Appeal and High Court's earlier judgments, the Supreme Court held that the Secretary of State had not acted *ultra vires* to implement the pilot scheme. The Court found that the scheme was within the meaning of s.10 of the RPA 2000, and it was a scheme as regards the "how voting" is to take place, which could include procedures for demonstrating an entitlement to vote.

Facts

The origins of the Government's voter identification proposals can be traced back at least as far as 2014, when the Electoral Commission recommended that voters in Great Britain should be required to prove their identity when casting their vote. This suggested that voting in person "remains vulnerable to personation fraud" due to the "few checks" in place to prevent impersonation (Electoral Commission, "Electoral Fraud in the UK: Final Report and Recommendations", January 2014, 5). Proposals to reform electoral practice did not feature in the Conservative Party 2015 general election manifesto. However, amongst other electoral reforms, their 2017 election manifesto pledged to "legislate to ensure that a form of identification must be presented before voting" (Conservative Party Manifesto 2017, 43).

In the May 2018 local elections in England, the first round of pilot schemes to act on this pledge were held in Bromley, Gosport, Swindon, Watford and Woking which required voters to present some form of identification before voting in polling stations. Immediately afterwards, the Government declared its intention to hold further pilots the following year. In early 2019, Ministerial Orders were made to authorise the second round of voter ID pilot schemes that took place in May 2019. A total of 10 councils participated, including Braintree District Council, meaning that eligible voters in that area were required to show either one form of photo ID or up to two forms of non-photo ID.

The appellant in this case, Neil Coughlan, a resident of Braintree District Council, was one such voter affected by the requirement to show identification. Coughlan first applied to the High Court in January 2019, after the Council signalled its intention to participate in the pilot schemes but before formal authorisation had been granted.

On 20 March 2019, Mr Justice Supperstone granted permission for the claimant to apply for judicial review to the High Court but dismissed the claim on its merits ([2019] EWHC 641 (Admin); [2019] 1 WLR 3851). As Supperstone J acknowledged, the central question of the case was "whether the voter ID pilots are schemes within the meaning of s.10(2)(a), that is, whether they are schemes for testing 'how voting…is to take place'". As such, Supperstone J focussed on two interrelated issues – the meaning of the words in the relevant provisions and their purpose. On the first issue, Supperstone J agreed with the defendant that the "natural and ordinary meaning" of the words "how voting at elections is to take place" are sufficiently broad to allow procedures requiring voters to prove their entitlement to vote. On the second issue, Supperstone J agreed with the defendant, finding that Parliament had intended for pilot schemes to test a range of matters, and that there "may be a range of important public interest considerations associated with the modernisation of electoral procedures extending beyond those specified matters".

The appellant then sought leave to appeal to the Court of Appeal, which was granted by Lord Justice Simon in October 2019. In the appeal the appellant focused on the ordinary meaning of the word "how" in s.10 of the RPA 2000, the overall text of s.10 when read as a whole requiring pilot schemes to be assessed in terms of their success in facilitating voting, and finally the legislative purpose of s.10 to facilitate and encourage voting. On 5 June 2020, the appeal was dismissed by the Court of Appeal ([2020] EWCA Civ 723; [2020] 1 WLR 3300) for essentially the same reasons as the High Court. The appellant then sought leave to appeal to the Supreme Court, which was subsequently granted in February 2021.

The decision of the Supreme Court

The Supreme Court heard the appeal on 15 February 2022 and issued judgment on 27 April 2022 dismissing the appeal ([2022] UKSC 11). Lord Stephens delivered the judgment to which the other Justices all agreed. The Court identified the two issues [3-4], primarily whether the Pilot Orders were *ultra vires* because the pilot schemes did not come within the meaning of s.10 of the RPA 2000, and additionally whether the pilot schemes were authorised for a lawful purpose consistent with the policy and objects of the RPA 2000.

On the primary issue, which constituted the majority of the judgment [9-76], the Court first identified and considered the relevant principles of statutory interpretation. Most importantly, the Court indicated that an analysis of the language used by Parliament is the primary source when deducing the purpose of legislative provisions [12-13]. The appellant pointed to various parliamentary statements made by the Home Secretary during the second reading of the Bill that became the RPA 2000, but the Court rejected the relevance of these due to the legislative provision in question not being sufficiently ambiguous [14].

After a detailed outline and examination of the applicable law [18-39], Lord Stephens found that the words "how voting…is to take place" in s.10 of the RPA 2000 were "sufficiently broad to encompass procedures for demonstrating an entitlement to vote, including by proving identity, as part of the voting process" [41]. Amongst other reasons, this was because s.10(2) allows modifications in a pilot scheme "differing in any respect" which was liberal permissive language, thus allowing a wide interpretation of "how" voting can take place [42]. The Court also found that Parliament declined to use a narrow formulation in s.10(1) when setting out the scope of pilot schemes, but rather chose wider language in the form of "how voting…is to take place" [44]. One of the most significant findings was that if a pilot scheme were implemented to test internet voting, then it would obviously require a voter identification requirement to be effective. As such, if s.10 were wide enough to allow internet voting with voter identification as a prerequisite, then s.10 would be wide enough to allow voter identification in polling stations [46-47].

Turning to the legislative purpose of s.10 of the RPA 2000, the Court rejected the appellant's argument that pilot schemes could only be implemented to facilitate or encourage voting, which is an issue that the Electoral Commission must consider when evaluating the success of a scheme pursuant to s.10(7)(c). Moreover, the Court found the Electoral Commission could report on other matters not just linked to whether the schemes encouraged or facilitated voting [50]. Rather, the Court found that voter identification might even improve public confidence in the electoral system if voter fraud was eliminated [51]. Ultimately, Lord Stephens found that the purpose of pilot schemes was to allow evidence to be gathered about the effects of changes to electoral practice, which would subsequently be analysed and inform decision makers in the future about the benefits of reform [52]. This could even extend to schemes that could have adverse effects on the exercise of the right to vote [53].

Despite rejecting the primary ground of appeal purely based on the statutory language of s.10 of the RPA 2000, the Supreme Court briefly considered the external materials relied on by the appellant, most of which were found to be irrelevant to the interpretation of the provision in question. This included several parliamentary reports [59-67], previous pilot schemes [70], an Electoral Commission report [71], and the "Pickles Report" [72].

Lastly, on the issue of whether the pilot scheme was implemented for a lawful purpose, the Court rejected the argument that pilot schemes were confined to facilitating and encouraging voting, but found, rather, that the purpose of pilot schemes was to gather information to assist in the modernisation of electoral procedures in the public interest [77].

Analysis

As the three courts each made clear, the sole purpose of the *Coughlan* case was to review the legality of the Cabinet Office's power to authorise the May 2019 voter ID pilot schemes, not to test the merits of compulsory voter identification. On this latter issue much legal analysis has already been offered and broader questions about the right to vote, political participation and the nature of British democracy itself arise (Ben Stanford, "Compulsory voter identification, disenfranchisement and human rights: electoral reform in Great Britain" (2018) 23(1) EHRLR 57-66).

Following the Conservative Party's significant election victory in December 2019, the Elections Bill was formally introduced in July 2021, receiving Royal Assent on 28 April 2022. Whilst the Act finally fulfilled the Party's 2017 General Election pledge to introduce compulsory voter identification for elections in Great Britain, it also enacted a whole raft of changes to electoral law, some of which have generated considerable controversy. The Act consists of seven Parts, further supplemented by 11 Schedules of considerable length and complexity to implement these changes. Whilst the introduction of voter identification requirements in Part 1 and Schedule 1 of the Act has attracted most attention, other reforms generate controversy. This includes the issuing of strategic direction for the Electoral Commission as well as removing its power to initiate prosecutions for breaches of electoral law (Part 3), reforms to third party spending and campaigning (Part 4), and a requirement for digital campaigning material imprints (Part 6).

The scale of these reforms, including the introduction of voter identification requirements, undoubtedly presents considerable administrative and financial challenges. Recognising these, the Chief Executive of The Association of Electoral Administrators recently expressed concern that the "current projected implementation timelines [for the Elections Act 2022] are optimistic at best, undeliverable at worst, especially for a 'no-fail' service like elections" (Letter from Peter Stanyon to the Minister for Levelling Up Communities, 17 May 2022). Moreover, assuming that a free identification card is provided for voters who

lack adequate documents, the Cabinet Office has estimated the cost could be up to £17.9 million per general election (Cabinet Office, Electoral Integrity Project – Local Elections 2018 – Evaluation p.43).

Given the scarcity of voter impersonation in UK elections, the necessity of such an expensive reform can be seriously questioned, whilst the potential negative impact on voter turnout and the risk of widespread disenfranchisement, particularly of minority groups, remains a serious concern. Moreover, there is a strong case for prioritising the reform of other areas of electoral law such as voter registration and party funding as a matter of urgency, as well as British democracy and constitutional issues more generally, which have been rocked by recent allegations of sleaze and declining standards.

Conclusions

Following the passage of the Elections Act 2022, millions of voters in Great Britain will now find for the first time in their lives that in order to cast their vote in polling stations, formal identification will be required. To minimise the risk of disenfranchisement, a mass publicity campaign will be required across the country in the run up to the first occasion identification is required, as took place in the various areas which participated in the 2018 and 2019 pilot schemes. This will be necessary to ensure that the electorate are aware of the new law, but also the exact forms of identification that are needed as well as those which will be rejected. Moreover, councils will need the sufficient time, resources and support to ensure that free identification can be provided to voters who do not possess suitable documentation. In this respect, the Government can look to Northern Ireland and the Electoral Office for Northern Ireland for four decades of good practice.

Ben Stanford, Senior Lecturer in Law, Liverpool John Moores University.

Criminal Law – Burglary – Dwelling – Hotel Room

R v Chipunza (Bruce) [2021] EWCA Crim 597

Court of Appeal (Criminal Division)

Facts

The appellant entered a hotel room in Canary Wharf, London. The hotel guest, who had checked in that room the evening before, had gone to work for the day and housekeeping staff were cleaning her room. The appellant walked into the room unchallenged. He telephoned the hotel reception and asked someone to come up and open the safe. The hotel manager went upstairs into the room and opened the safe but found it to be empty. The manager subsequently checked the hotel CCTV footage and realised that the appellant was an intruder. The manager challenged the appellant, who then left the hotel. Nothing was stolen. The appellant was later arrested.

The appellant was charged with two alternative counts of burglary contrary to s.9(1)(a) of the Theft Act 1968. On count 1, the appellant was said to have entered a dwelling, namely the hotel room, as a trespasser with the intention of committing theft. On the alternative count 2, the appellant was said to have entered part of a building as a trespasser with the intention of committing theft. The facts to support the two counts were identical. The only issue was whether or not the hotel room constituted a 'dwelling' for the purposes of s.9(3), which creates separate offences of burglary of a dwelling (domestic burglary) and burglary of a non-dwelling (non-domestic burglary).

Following trial, the appellant was convicted of burglary of a dwelling under count 1. He appealed against conviction on two grounds. First, that the judge misdirected the jury in providing a definition of 'dwelling', which placed undue emphasis on the concept of habitation, and second that the judge's comments in summing up to the jury were unfair.

Decision

The appeal was allowed. The term 'dwelling' is an ordinary English word, and it was settled law that whether a building constituted a dwelling is a matter of fact for the jury (for example, *R v Flack* [2013] EWCA Crim 115). Nevertheless, the judge should have guided the jury as to what a dwelling was. It would have been sufficient to say that a dwelling was a building or part of a building in which a person was living and makes his/her/their home. The most usual examples of dwellings are houses and flats in which people live and make their homes, but other buildings or part of buildings may also be dwellings. The judge had misdirected the jury as to the meaning of a dwelling and had failed to provide a balanced account of the features that may have been taken into consideration as pointing towards or away from the hotel room being a dwelling.

In summing up to the jury, the judge erred by failing to provide a balanced view, directing the jury toward the reasons why the hotel room might constitute a dwelling, but failed to remind the jury of matters which supported the appellant's case that the room was not a dwelling. The most striking feature that pointed away from the room being a dwelling was

the transient nature of the hotel guest's occupation. She had arrived at the hotel the previous evening and intended to stay for three nights. She had bought only the belongings that were necessary for the duration of her stay. The judge ought to have invited the jury to consider whether such an occupation was consistent with the room being a dwelling. The imbalance in the guidance provided to the jury rendered the summing up unfair. It followed that the conviction was unsafe and that the conviction must be quashed. The prosecution did not seek a retrial on the ground that it was not in the interests of justice to do so.

Commentary

The law distinguishes between burglary of a dwelling and of a non-dwelling to give due consideration to the differences in types and levels of harm experienced by the victim. A 'dwelling' includes a home and as such is considered to be a private and secure space into which unauthorised intrusion is likely to lead to greater feelings of distress, violation and possibly endangerment than would be the case in non-dwelling premises, such as an office, factory or warehouse. The Theft Act 1968 sets two different maximum penalties for burglary, depending on whether the offence takes place in a dwelling or not. For burglary of a dwelling, the maximum sentence is 14 years' imprisonment (s.9(3)(a) Theft Act 1968), and for other types of burglary, the maximum is set at 10 years' imprisonment (s.9(3)(b)).

The Theft Act does not define a dwelling other than by providing that inhabited vehicles and vessels can constitute a dwelling for the purposes of s.9(3)(a), irrespective of whether or not the vehicle or vessel is in fact inhabited at the time of the offence (s.9(4)). In most burglary cases, it will be obvious whether or not the building in question is a dwelling. There are, however, situations where the nature of the property as a dwelling will be less obvious, and the Court of Appeal has had to consider the meaning of 'dwelling' on a number of occasions. Where there is any uncertainty as to the nature of the building, *R v Flack* [2013] EWCA Crim 115 provides that two alternative counts should be entered on the indictment: one for domestic burglary and another for non-domestic burglary, and that the matter should be left to the jury to decide.

The Court has faced the question of the proprietary nature of a hotel room on a few occasions recently, and these have given rise to potential confusion. In *R v Addai Kwame* [2018] EWCA Crim 2922, a hotel building contractor used a master key to enter a number of hotel bedrooms and stole items from within. He was convicted of non-domestic burglary. On appeal against sentence, the Court of Appeal described the offences as *similar to* domestic burglaries, but there was no suggestion that the appellant should have been convicted of domestic burglary. In *Hudson v Crown Prosecution Service* [2017] EWHC 841 (Admin), reference was made to the fact that a hotel room had been found to be a dwelling in *R v Massey* [2001] EWCA Crim 531, but this is a misreading of that decision. *Massey* was an appeal against sentence where the appellant had pleaded guilty to the burglary of two hotel rooms and was sentenced to five years' imprisonment. The Court of Appeal considered that, on the facts of the case, the offences were *akin to* domestic burglaries that aggravated the seriousness of the offence. The Court did not suggest that these were burglaries of a dwelling.

There may, however, be times when a hotel room is properly regarded as a dwelling, such as where the occupant lives in the hotel long term and uses it as their home. Some hotel rooms may be provided for staff to live in, and those rooms could be deemed to be dwellings. While the question of whether or not a building constitutes a dwelling remains a matter for the jury, it is most likely correct that, ordinarily, a hotel room should not constitute a

dwelling. Hotels are not generally built to be used as dwellings. Their function is commercial in nature, and they provide a temporary place to stay. While hotels invariably include private rooms, the hotel guest does not have adequate control over that space to exclude others from entering the room, or to furnish or decorate the space. A hotel stay is transient in nature and lacks any sense of permanence or continuity that might otherwise signal that the space is a dwelling. By providing a definition of 'dwelling' as 'a building or part of a building in which a person is living and makes his/her/their home' (at para [42]), the Court of Appeal has at least provided some welcome guidance to juries in the future.

Dr Gary Betts, Coventry Law School, Coventry University.

Free speech – harassment – proportionality – European Court of Human Rights

Pal v United Kingdom Application No. 44261/09, decision of the European Court of Human Rights 30 November 2021

European Court of Human Rights

The facts and domestic proceedings

The applicant was a journalist, concentrating on whistleblowing issues within organisations such as the National Health Service. In or about June 2011, she became involved in a dispute with AB, a barrister and journalist who worked for "Private Eye", linked to *Patients' First*, a network of health professionals and their supporters working to protect whistle-blowers. The dispute led to a series of email allegations and counter-allegations between the two and a complaint by AB about the applicant's conduct to the Commissioner of Police for the Metropolis led to a Prevention of Harassment Letter being served on the applicant. The letter informed the applicant that an allegation of harassment had been made against her and that AB had asked her to stop sending him emails as he was feeling harassed by their content. She was also notified that if she committed any act or acts either directly or indirectly that amount to harassment she might be liable to arrest and prosecution.

In July 2014, the applicant wrote and published an article on her website, the *World Medical Times*, entitled '[AB] of Patients First'. The article detailed some of AB's alleged professional contacts and contained links to a judgment of the Bar Council concerning AB and a newspaper article concerning his representation at an Employment Tribunal, for which, according to the applicant, he was heavily criticised. The article ended with an invitation to readers to send the applicant any information they had about AB or *Patients' First*. In response, AB emailed the applicant on 30 July 2014, and the applicant subsequently complained to the West Midlands Police, who emailed AB on 1 August 2014 to say that if he wished to make any complaint about the article, he should do so via the World Medical Times and not to the applicant directly. In November 2014, the applicant posted a series of Tweets that suggested (incorrectly) that the police had issued a harassment warning against "Private Eye's journalist" and "Peter's friend". In December 2014, AB provided a detailed statement to the police in which he emphasised the acute anxiety that had been caused by the applicant's behaviour over a number of years. He described the information she had published about him as "largely false, twisted, spiteful and bizarre". He further claimed that the applicant's behaviour had affected his career and his employment prospects.

In December 2014, the Metropolitan Police arrested the applicant in Birmingham on suspicion of harassment contrary to s.2 of the Protection from Harassment Act 1997. She was handcuffed and driven approximately 185 kilometres to London, and interviewed under caution. She was then detained for approximately seven hours before being bailed, subject to conditions, to re-attend the police station on 22 January 2015. In January 2015, she was charged under s.2 of the 1997 Act. In March 2015, the applicant appeared at a Magistrates' Court and entered a plea of not guilty, but in August 2015, the Crown Prosecution Service discontinued the prosecution on the basis that there was insufficient evidence to establish a

realistic prospect of a conviction under the Act. An award of costs, including an amount in respect of her legal costs, was made in her favour.

In February 2016, the applicant issued proceedings against the Metropolitan Police seeking damages and declaratory relief for assault, unlawful arrest, false imprisonment, malicious prosecution and breach of Article 10 of the European Convention and on 24 January 2018 the County Court judge dismissed the claim on all causes of action. The judge found that the arrest had been lawful, accepting that the arresting officer had an honest suspicion that the applicant had committed the offence of harassment. He also found there to be ample evidence to support the reasonableness of that suspicion, namely the content of the article and the Tweets, and the witness statement made by AB detailing his distress at the applicant's conduct. The judge further found that there had been objectively reasonable grounds for believing that the arrest was necessary to allow for the prompt and effective investigation of her conduct. The judge also found that the use of handcuffs when arresting the applicant, and in transporting her to London, had been justified, and that there had been reasonable and probable cause to charge the applicant under s.2 of the Act.

With regard to the applicant's complaint under Article 10, the judge noted that the arrest was lawful, and the prosecution was made with reasonable and probable cause and not malicious. Therefore, the arrest and charge of the applicant, which did not interrupt, curtail and prevent the exercise of the fundamental right to freedom of expression, simply did not engage Article 10. The judge also found that the bail conditions did not engage Article 10; even if Article 10 was engaged, the judge considered the interference to be justified under paragraph 2, as it had a clear purpose, namely the prevention of crime, which was achieved by preventing any possible recurrence of the alleged offence.

On 28 August 2018, the High Court granted the applicant permission to appeal (*Pal v COP* [2018] EWHC 2837 (QB)). The judge – Nicklin J - considered that Article 10 of the Convention governed the entirety of the decision and it should have been at the forefront of the consideration of the issues that arose. In his view, an analysis of harassment and whether there was an objectively reasonable basis to suspect the commission of an offence in a case involving speech required a very careful consideration of what, objectively judged, amounted to harassment in the communications complained about (at [8-10]). It was arguable, in his view, that the acts relied upon did not, as a matter of law, provide an objectively reasonable basis of the suspicion that an offence had been committed (at [27]).

On 9 November 2018, the High Court dismissed the applicant's appeal *(Pal Commissioner of Police of the Metropolis* [2018] EWHC 2988 (QB)). In the judge's view, the County Court judge had been entitled to find that the arresting officer had an honest objectively justified suspicion that the applicant had committed an offence of harassment (at [24]). Further, there was evidence to support the County Court judge's conclusion that the arrest was necessary (at [25]). The High Court also agreed that there had been no breach of Article 10. The applicant enjoyed a qualified right to freedom of expression, both as a journalist and as an ordinary citizen, since the right could be restricted or subject to penalty for the prevention of disorder or crime. Her arrest had been found to be lawful, and where that was the case, it was difficult to conceive of circumstances that could give rise to a breach of Article 10. Accordingly, the judge was correct to find no arguable claim that the applicant's Article 10 rights had been breached by her arrest [at 27-29].

The applicant had argued specifically that her Article 10 rights should have been considered before the decision to arrest her was made. While Goose J accepted that her Article 10 rights were relevant at that stage, he noted that the County Court judge had considered Article 10 as part of the objective justification test. Accordingly, the County Court judge had not been wrong to conclude that Article 10 was not engaged, in the sense that it had not been breached by the applicant's arrest [at 31-32].

The applicant applied unsuccessfully to the Court of Appeal, and then the Supreme Court for permission to appeal, and then lodged application to the European Court, complaining that her prosecution, the manner in which her arrest was carried out, and the conditions of bail imposed on her, breached her rights under Article 10.

The decision and the European Court of Human Rights

The application was declared admissible (*Pal v United Kingdom*, Application No. 44261/09, decision of the European Court of Human Rights 30 November 2021), the Court accepting that that her arrest and prosecution on suspicion of an offence under the Protection from Harassment Act 1997 was a plain interference with her rights under Article 10 of the Convention at [42].

Turning to the merits of the application, the Court accepted that any interference with the applicant's Article 10 rights was prescribed by law and that it pursued a legitimate aim of either preventing disorder and crime or protecting AB's rights at [51-52]. On the question of whether it was necessary in a democratic society in order to achieve that aim the Court referred to the principal case law concerning the proportionality and necessity of an interference with freedom of expression (at para 53). It then stressed that the test of necessity requires the Court to determine whether the interference complained of corresponded to a pressing social need, whether it was proportionate to the legitimate aim pursued, and whether the reasons given by the national authorities to justify it are relevant and sufficient (at [54]). Referring to the margin of appreciation, it then stated that where the balancing exercise has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case law, it would require strong reasons to substitute its view for that of the domestic courts (at [54]).

The Court recognised that it had identified a number of criteria in the context of balancing the competing rights under Articles 8 and 10 of the Convention. This included the contribution to a debate of public interest, the degree of notoriety of the person affected, the subject of the news report, the prior conduct of the person concerned and the content, form and consequences of the publication (at [54]). In particular, and of relevance to the case in hand, the Court reiterated that a distinction needed to be made between statements of fact and value judgments. Thus, while the existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof, and the requirement to prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself, which a fundamental part of the right secured by Article 10 (at [54]). Although value judgments must often have a factual basis for them to be considered proportionate, in order to distinguish between a factual allegation and a value judgment it is necessary to take account of the circumstances of the case and the general tone of the remarks. Further, in doing so it should bear in mind that assertions about matters of public interest might, on that basis, constitute value judgments rather than statements of fact (at [55]).

Applying those principles, the Court stated that when examining the necessity of an interference in the interests of the protection of the reputation or rights of others, the Court may be required to verify whether the domestic authorities struck a fair balance when protecting freedom of expression and the right to respect for private life (at [57]). In the present case, the arresting officer stated that she had considered the applicant's Article 10 rights when forming her honest and reasonable suspicion that the arrest was necessary, but then discounted them because AB found that what was written about him affected his privacy. There was no record of such consideration, but nonetheless the High Court judge accepted the evidence of the arresting officer (at [58]). Taken at its highest, her conclusion appears to have been based on the subjective viewpoint of AB himself, without any acknowledgment of the fact that the right to freedom of expression extends to information or ideas that offend, shock or disturb. Moreover, there was no evidence that the criteria identified by the Court as being relevant to the balancing of the respective rights were taken into account prior to the applicant's arrest (at [59]).

In particular, the Court noted that no consideration appeared to have been given to the subject matter of the applicant's article and tweets, and whether they could be said to have contributed to a debate of general interest. Neither had any consideration been given to the prior conduct of AB, and whether the nature his activities, as a fellow journalist, were private or public in nature; with the consequence that he could be subject to wider limits of acceptable criticism than ordinary citizens. Further, there was no investigation as to whether the information in the article or tweets was true; or whether the attack on AB's reputation attained a sufficient level of seriousness and caused prejudice to his personal enjoyment of the right to respect for his private life (at [59]).

The Court then noted that notwithstanding this, these criteria were central to the subsequent decision of the CPS to discontinue the prosecution, the CPS not being satisfied that the material published by the applicant justified restricting her Article 10 rights. Nevertheless, when the applicant brought her claim against the Metropolitan Police, neither the County Court nor the High Court considered the criteria. Further, while the judge who heard the appeal accepted that Article 10 was engaged, he found that there was no violation, principally because the applicant's arrest had been lawful and because the arresting officer confirmed that she had considered the applicant's rights when forming her honest and reasonable suspicion that the arrest was necessary. This conclusion appears to have been based solely on the subjective viewpoint of AB himself, and did not entail any assessment of the relevant criteria identified by the European Court as relevant to the balancing of the rights (at [61]). Accordingly, the Court concluded that the reasons given by the national authorities to justify the interference with the applicant's Article 10 rights were neither relevant nor sufficient, and that there has been a breach of Article 10 (at [62-3]).

Commentary

The decision of the European Court in *Pay* might be regarded as a simple one-off, where both the police and the courts gave little or no consideration to free speech rights, the High Court in particular ignoring the pleas of Nicklin J to confront the appeal from an Article 10 standpoint. If that is the case, the judgment does little but provide just satisfaction to the applicant for the injustice suffered by her in this particular case, and the courts will take greater care in the future to consider all the relevant factors and give greater attention to free speech values.

However, what happened in this case might be indicative of a more worrying trend with respect to the recognition of free speech norms in harassment cases. Two things are of concern here. First, as the defendant is accused of an act of harassment, both the police and the courts might start with a presumption that the act is unlawful and unreasonable. Instead, both the police, and to a greater extent the courts, should investigate all the circumstances and decide whether the interference with the defendant's free speech is justified as necessary and proportionate, as required by the jurisprudence of the European Court, and noted by Nicklin J when granting leave to appeal. Such a presumption of unreasonableness is - in general - not evident in misuse of private information or defamation cases, and the courts are well versed in balancing the claimant's rights with the prima facie right of the defendant to publish.

Responding to the warning shots from the European Court in *Pal v United Kingdom*, we are entitled to conclude that the Article 10 rights of defendants are, in the main, adequately safeguarded in harassment proceedings. This is the situation provided there is some discernible public interest in that speech, and that this public interest has not been lost by the unreasonable and gratuitous actions of the defendant. That protection will not always be as favourable as offered in cases involving privacy and defamation cases, as an allegation and a finding of harassment indicates that the conduct and speech has gone beyond the acceptable. Further, when that speech has little public interest merit – and pursues instead a mainly private grievance - it is likely that the court's finding that the defendant's conduct amounts to harassment will be followed by its rejection of the reasonableness defence under s.1(3).

The decision in *Pal* has highlighted the need to apply the principles of free speech and proportionately consistently and appropriately to cases which justify the recognition of essential principles of free speech and public debate. The domestic proceedings in *Pal* witnessed a number of essential errors, by the police and the courts, leading to unnecessary action taken against the journalist, and the dismissal of a legitimate private claim because of the courts' failure to follow the essential principles of free speech and proportionality.

What the judgment in *Pal* has done, however, is to concentrate the minds of the police and the courts, at first instance and on appeal and review, on the importance of human rights in the interpretation and application of domestic law, both generally and in the area of free speech, more specifically the law of harassment. It has also clearly reminded us of the role of campaigners and bloggers in the dissemination of public interest speech and the encouragement of public debate. Such protection should not be lost simply because allegations of harassment have been made, and the complainant has been insulted or inconvenienced. The 1997 Act should only be used in cases where the rights of others have been affected disproportionately, account being taken of the need for tolerance and the characteristics of open debate. A departure from those norms, concentrating on public order and the right of individuals to be free from irritation will lead to injustice, and more claims to the European Court.

Dr Steve Foster, Coventry Law School

BOOK REVIEWS

Parental Imprisonment and Children's Rights, by Aisling Parkes and Fiona Donson (eds), Routledge, 2021; *Mothering from the Inside*, by Kelly Lockwood, Emerald Publishing, 2020

These two books report on research undertaken both in the UK and beyond on parental imprisonment, its impact on children and other dependants, and the impact of relevant human rights law. Together they supply both a wealth of information on practice and insights into the protections that human rights conventions provide, at least in theory, to parents in conflict with the law and their children.

I must declare an interest: a chapter of the text *Parental Imprisonment* was written by your reviewer, reporting on research done at Coventry University Law School.

We begin with some history. In 2001, in a landmark judgment Lord Justice Phillips stated that in sentencing a mother of dependent children, the rights of the child must be weighed against the seriousness of the offence in a 'balancing exercise'.

> It goes without saying that since October 2, 2000 sentencing courts have been public authorities within the meaning of s.6 of the Human Rights Act. If the passing of custodial sentence involves the separation of a mother from her very young child (or indeed, from any of her children) the sentencing court is bound…to carry out the balancing exercise…before deciding that the seriousness of the offence justifies the separation of mother and child. If the court does not have sufficient information about the likely consequences of the compulsory separation, it must, in compliance with its obligation under s.6 (1) ask for more.[1]

This important statement of children's rights went unreported in the general press, and it appeared not to have led to changes in the judicial system. There was no discussion of how the criminal courts were to obtain the information that was now required. Who would make this enquiry and how was it to be done? What of the right to privacy if the parent or child did not want such an enquiry to be made? How would those issues be resolved? The Judicial College, whose duty it is to train judges and magistrates, undertook no training for sentencers in how they were to conduct the balancing exercise. There was no academic discipline 'Parental imprisonment and children's rights'. No one examined practice in the courts to find out what, if anything had in fact changed after the *P and Q* judgment.

Having read the judgment in *P and Q* in 2011, and believing that change in practice should have resulted, I decided to research this topic. Did the sentencing remarks made when judges and magistrates imposed custody on mothers indicate that they had conducted the balancing exercise, as required by Lord Phillips' dicta?

[1] *R (on the application of P and Q) v Secretary of State for the Home Department* [2001] EWCA Civ1151, available at https://www.bailii.org/ew/cases/EWCA/Civ/2001/1151.html.

The study of 75 sentencing decisions found that the courts did not appear to have considered the Article 8 rights of children potentially affected by their mother's imprisonment. The report concluded:

> The vast majority of women are imprisoned for less serious offences and receive short sentences: the balancing exercise should now take centre stage.[2]

The work of Dr Shona Minson, University of Oxford, followed. She interviewed judges, as well as children of imprisoned mothers and the family members who took care of the children left behind. She then developed training materials for the judiciary, the legal professions and defendants, which explained the requirement to consider the rights, needs and welfare of affected children.[3]

The academic discipline *Parental Imprisonment and Children's Rights* developed. Awareness has grown that children's rights are indeed engaged when parents are sentenced. In 2019, the Joint Parliamentary Commission on Human Rights gathered evidence on sentencing and issued its report, which stated:

> When a judge is considering sending a primary carer, which is usually a mother, to prison, the child's right to respect for family life should be a central concern. Too frequently, this is not the case. As a result, tens of thousands of children each year are being harmed when their mothers are sent to prison, the vast majority for non-violent offences.

Two international meetings on parental imprisonment and children's rights were held at University College Cork, in December 2014 and in June 2015. The book edited by Aisling Parkes and Fiona Donson followed the second conference and is based on presentations given there.

Parental Imprisonment and Children's Rights, by Aisling Parkes and Fiona Donson (eds), Routledge, 2021

Lorna Brookes' powerful Foreword to this book presents the reflections of twelve children who have a parent in prison, and who were supported by *Time Matters UK*. It shows how rights could improve the lives of children.[4] When a parent is arrested and facing a potential custodial sentence, children want their views to be listened to with care. They also want their other parent to be offered emotional support and practical help because they worry about them as well as the parent who may be going to prison. Far from feeling they had rights, the children interviewed felt ignored: 'We are unseen and unheard.'

The book has three sections: voices; policy; and law. In the first section, Ben Raikes discusses the experiences of children whose parents are sentenced to imprisonment in the context of their rights as enshrined in the United Nations Convention on the Rights of the Child (UNCRC). Dr Raikes begins by stressing the significance of Article 3, which states that all decisions that affect children must be made with the affected children's best interests as the guiding principle. As he writes: 'It is hard to think of a decision that affects a child

[2] http://www.makejusticework.org.uk/wp-content/uploads/Mothers-in-Prison-by-Rona-Epstein.pdf
[3] https://shonaminson.com/safeguarding-children-when-sentencing-mothers/
[4] https://www.timemattersuk.com/

more profoundly than the imprisonment of their parent'. Yet, very few countries (South Africa is the exception) have developed case law to encourage the judiciary to explain why they are imposing a custodial sentence despite having taken into account the effect of it upon the children of the imprisoned parent.

In their chapter 'Living with the pains of confinement' Una Convery and Linda Moore consider imprisonment in Northern Ireland and discuss the effects of imprisonment on families:

> Parental incarceration and children's rights are inevitably in tension. Societal reflection is needed on the long-term consequences for children affected by parental imprisonment with consideration of more appropriate ways of responding to social harm.

In their chapter 'Making children visible: children's rights and their role in parent-child contact within the prison system' Fiona Donson and Aisling Parkes outline the relevant human rights provisions which apply when parents are incarcerated.

The Council of Europe Recommendation, 2018, states as its basic principle that:

> Children with imprisoned parents shall be treated with respect for their human rights and with due regard for their particular situation and needs. These children shall be provided with the opportunity for their views to be heard, directly or indirectly, in relation to decisions that may affect them. Measures that ensure child protection, including respect for the child's best interests, family life and privacy shall be integral to this, as shall be the measures that support the role of the imprisoned parent from the start of detention and after release.

Adopting this recommendation has allowed children of an imprisoned prisoner to be recognised. 'However, while they are far higher on the agenda than previously … their "visibility" is actually hazy, and their rights are poorly understood.' They conclude that, while there have been improvements in child-parent contact in the Irish prison system in recent years, with positive change to support children and families, there remains the need to focus on specific rights of children in order the reframe how prison visits are understood and should be reformed. This is to ensure that they effectively meet the rights of children who have a parent in prison.

Marie Hutton reveals a personal interest: she spent much of her early childhood visiting a relative in prison. In her chapter 'Children first: Putting the rights of children visiting prisons at the heart of policy and practice', she reports and reflects on her research which involved interviewing prisoners in two English medium-security prisons about their contact with their families, including their children, while in prison. In these interviews, they described the deleterious effects of their imprisonment on their children. Dr Hutton argues that the children of imprisoned parents are viewed as a potential solution to the problem of re-offending and are utilised as a mechanism for exercising control over prisoners' behaviour, as prison visits are determined by prisoners' entitlements under the Incentive and Earned Privileges (IEP) scheme. This is directly opposed to a rights-based view, which would respect the rights of prisoners' children to contact with their parents and other relatives. The instrumentalisation of children of imprisoned parents as solutions to the prison's 'problems'

of reducing re-offending and maintaining order via the IEP system weakens the status of these children as rights holders under the UNCRC. This contradicts the fundamental principle that the state should act in the best interests of the child.

'Starting Life in prison: reflections on the English and Irish contexts regarding pregnancy, birth, babies and new mothers in prison, through a children's rights lens' by Sinead O'Malley, Lucy Baldwin and Laura Abbott begins with this stark statement: The imprisonment of mothers may involve the separation from her infant or young child which has the 'potential for life-long harm'.

Rule 64 of the Bangkok Rules states:

> Non-custodial sentences for pregnant women and women with dependent children shall be preferred where possible and appropriate, with custodial sentences being considered when the offence is serious or violent, or the woman represents a continuing danger, and after taking into account the best interests of the child or children, while ensuring that appropriate provision has been made for the care of such children.

Despite various calls to apply non-custodial sentences to mothers and to pregnant women, such change has not taken place. How far the current practice differs from that advanced by the Bangkok Rule can be seen in the statistics showing the continuing imprisonment of women, including both mothers of young children and pregnant women for minor, non-violent offences.

The authors recommend a 'mandatory cohesive informed response that centres the rights and well-being of the child as well as the mother.'

> In a considered reform of the landscape for criminalised pregnant mothers and their babies, alternatives to prison Mother and Baby Units as we understand them must be considered. Options that promote the mother-child bond, whist responding holistically to the mother and her needs and simultaneously meeting the needs of the unborn and newly born child, must be explored. Outcomes for mothers would be improved, enabling them to reach their full potential, significantly improving outcomes for their babies and ensuring the best possible start to live – as all children equally deserve.

'Framing and children's rights in Europe' by Liz Ayre traces the history of issues of parental imprisonment in Europe, focussing on developments in Ireland, and noting the founding of the Irish Penal reform Trust in 1994 and the Department of Justice's publication of a five-year plan in 1994. The Good Friday Agreement introduced obligations for the Republic of Ireland to introduce a level of equality and human rights protections at least equivalent to those of Northern Ireland.

In 'Prisons, families and human rights' Peter Scharff Smith & Emma Villman outline the history of prisoners' rights, emphasising the importance of *Golder v UK* (1975) when the ECtHR established that prisoners have the same rights as other citizens apart from those immediately related to their sentence. However, there are also people outside prison whose rights can be violated due to the imprisonment of others:

> The rights of this group [prisoners' families and dependants] are not well developed within the field of prisons and human rights, but there are interesting developments in progress, where the rights of children with imprisoned parents have gained attention. 2011 cross-national European research project on children with an incarcerated parent, led to a call for all states to incorporate the UNCRC in relation to children of imprisoned parents. UN Committee on the rights of the Child recommended that States parties ensure that the rights of children with a parent in prison are taken into account from the moment of the arrest of their parent and by all actors involved in the process and at all its stages.

The UNCRC 1989 sets out that children are individuals with their own special rights:

1. Protection of the best interest of the child
2. Right to have regular contact with the imprisoned parent
3. Right to express his or her view and to be heard in matters affecting him or her.

The child's best interests led to the recommendation that when 'sentencing parent(s) and primary caregivers, non-custodial sentences, should, wherever possible, be issued in lieu of custodial sentences, including in the pre-trial and trial phase. Alternatives to detention should be made available and applied on a case-by-case basis; 'non-custodial sentences should wherever possible, be issued in lieu of custodial sentences, including in the pre-trial phase'. Alternatives to imprisonment should be considered to ensure the best interests of the child.

In his chapter 'Re-imagining the Paramountcy Principle' Justice Albie Sachs gives a personal and powerful account of how he came to make the landmark judgment in *S v M* (2007) in the South African Constitutional Court:

> Focused and informed attention needs to be given to the interests of children at appropriate moments in the sentencing process. The objective is to ensure that the sentencing court is in a position adequately to balance all the varied interests involved, including those of the children.

The South African Constitution provides that a child's best interests are of paramount importance in every matter concerning the child (Section 28 (2)). If there is a fair chance that the person concerned could be a primary caregiver and the magistrate is considering jail, or planning to send the person to jail, then they have to inquire into how the children will be affected. At this point, the role of the prosecution becomes different from the ordinary position a prosecution might adopt: it is to assist the court in protecting the best interests of the children.

Professor Helen Codd, University of Central Lancashire, provides an international perspective in her chapter 'Every child matters? Global perspectives on incarcerated mothers and their children'. Children of imprisoned parents, especially mothers, experience avoidable harms. Thus, 'if we are serious about children's rights then these harmful practices are in urgent need of challenge and reform. Rights need to not only be 'rights on paper' but also 'rights in practice', where children's rights are a key criterion for penal policies, practices and decisions from the outset. The UNCRC provides a foundation for such an approach, as do the South African cases; and common themes dominating the

experiences of the children of imprisoned mothers mean that it would be possible to identify and promote a common global framework of specific rights for the children of imprisoned mothers. This framework could then allow for local variations to respond to specific regional needs.

> We should not turn away from radical abolitionist perspectives which challenge the use and existence of prison itself. Women prisoners are likely to have committed non-violent offences and be categorised as non-dangerous and low risk after release, and thus there is a very real question as to why they are imprisoned at all if they do not pose a risk and a custodial sentence would harm their children.

Mothering from the Inside, by Kelly Lockwood, Emerald Publishing, 2020

Kelly Lockwood brings attention to the experiences and perspectives of women who are 'mothering from the inside', their children, their families and those who work for and support them, exploring a range of issues associated with mothering and imprisonment in England and Wales. There are two parts: Part 1 - 'From Sentence to Resettlement' and Part 2 - 'From the Margins to the Centre'.

Part 1 focuses on a number of interrelated issues, including sentencing, maintaining maternal contact, pregnancy and childbirth and resettlement. In the first chapter Dr Shona Minson, University of Oxford, relates her research in which she interviewed judges who sentence women and the children of mothers in prison and the caregivers who have taken on the children left behind when mothers were imprisoned. She explains the training resources she has developed to help ensure that the judiciary, the legal professions and the public understand the duty imposed on sentencers to consider the rights of the child when sentencing a mother. Dr Natalie Booth, Bath Spa University, writes on contact between mothers in prison and the children outside, detailing the ways in which mothers, their children and those caring for them construct and adjust communicative practices to promote mother-child contact during imprisonment. This is illustrated with moving accounts of the willingness of mothers to make personal sacrifices in order to maintain and maximise maternal contact.

Dr Laura Abbott and Kelly Lockwood's chapter highlights the perspectives of pregnant women and new mothers in prisons. Writing of the work of the Prison Reform Trust, Sarah Beresford and others highlight how children with mothers in prison may remain invisible, and reveal the level of disruption caused to their lives and the stigma they experience. They demonstrate that, despite challenges, with the right support, children can become more resilient and develop the skills needed to thrive. Dr Lucy Baldwin, De Montfort University, focuses on resettlement with its many challenges, and the longer-term impact of maternal imprisonment. She discusses maternal identity, describing how mothering identities may become damaged due to imprisonment and consequent maternal separation with long-lasting implications for mothers' sense of self, relationships with their children and ability to engage with rehabilitative processes.

Part Two - 'From the margins to the centre' - covers perspectives and experiences relating to mothering and imprisonment. This section highlights the importance of understanding how factors such as age and mental health interreact with the experience of imprisonment. It deals with both the mothers who are in prison and the professionals working with them.

It brings attention to a rarely considered group affected by maternal imprisonment, the adult children of women in prison.

Kelly Lockwood explores the experiences of mothers in prison who have adult children, illustrating the strength of maternal identities as children transition to adulthood, and how imprisonment may disrupt those identities. Rachel Dolan then reports on her research in which she interviewed 85 pregnant women in custody across nine prisons in England, Dr Dolan makes a number of important recommendations for policy and practice. She says:

The very imprisonment of vulnerable pregnant women is a cause for real concern, particularly but not only in the case of minor offences and first-time offenders. The issues identified in this study highlight the continued risks for women imprisoned during pregnancy and for their children… Deferred sentencing of pregnant women, as in Germany, Denmark and the Netherlands, is one approach that could be implemented in England to reduce the negative impacts on mothers and children.

This is all considered in our recent research report *Why Are Pregnant Women in Prison*?*"*[5] It is to be hoped that this will be widely discussed. Deferred sentencing is clearly explained in a recent article by Julian Roberts.[6]

Tony Wood discusses the work of prison officers with a focus on female prison officers as mothers and their relationships with women in prison who are also mothers. The chapter explores how gendered experiences such as pregnancy, miscarriage, childbirth and child rearing (of both prison officers and women in custody) impact on their working role, home life and relationships at work.

Lorna Brookes recounts the experiences of a practitioner whose role is to support children affected by maternal imprisonment. She describes the challenges and the successes in this field, focussing on how to help children who have contact with their mothers in prison as well as those who for whom contact has been severed. Her research began with her asking women who had had repeated prison sentences

'*What support do you need [to resettle successfully back in the community]?*' She was surprised by how often the reply was along the lines of '*There's nothing to help my little girl cope with all this'*, '*I'm so worried about my son, he's angry and it's my fault ... something should be done to help him*'.

Brookes writes: 'I looked for formal acknowledgement of these children in the judicial services and any specialised children of prisoners support services, but on both counts found them to be scarce to non-existent'. Her account of the support to given to children whose

[5] Epstein, R., Brown, G., Garcia De Frutos, M. (2022) Why are pregnant women in prison? Coventry University
https://www.coventry.ac.uk/research/research-directories/current-projects/2020/why-are-pregnant-women-in-prison/
R. Epstein and G. Brown 'We should stop sending pregnant women to prison' (2022), Centre for Crime and Justice Studies https://www.crimeandjustice.org.uk/resources/we-should-stop-sending-pregnant-women-prison

[6] Roberts, J.V. (2022) *Deferred Sentencing: A Fresh Look at an Old Concept* Crim. L. R., Issue 3.

mothers are in prison is profoundly moving. I believe it should be compulsory reading for every sentencer in our criminal courts.

In her chapter *'*An International Perspective on Mothering and Imprisonment' Professor Helen Codd explains that while there is growing focus on the needs and experiences of imprisoned mothers and their children, this tends to focus on single countries. However, several common themes emerge when looking at international perspectives. Thus in the UK and the USA, much of the debate is on keeping mothers and children together, while in many other countries the focus is on how to develop practical and realistic alternatives to children growing up in prison with their mothers. This chapter contains a wealth of references to studies from around the world, which focus on mothers in prison, covering many issues concerning the nature of prison itself, which is marked by dynamics of control and submission, power and domination. Professor Codd quotes L. Haney: the key question may not be whether parenting from prison is worse that parenting in prison. Instead, it should be how we can do better to create real alternatives to the penal state.[7]

That is indeed the question – and both these volumes make a very valuable contribution to that debate.

Rona Epstein, Honorary Research Fellow, Coventry Law School

[7] Haney, L. 'Motherhood as punishment: the case of parenting in prison' (2013) 39 (1) *Signs*, 105.

STUDENT ESSAYS

BANKING LAW

A Chinese perspective: the enlightenment of the UK financial system

Lv Mengyan, Liao Zhaojie and Gu Jindong*

Introduction and background

The increased economic status of China and the 2007-2009 financial crisis have called for a more modernised regulatory regime to address existing flaws in China, which could be fixed with the help of the reform seen in the UK. Since 2017, the Chinese financial regulatory structure has experienced a transformation from an old regime 'one bank and three commissions' to a new framework 'one committee, one bank and two commissions', indicative of the FSDC, the CBIRC (combining the CBRC and the CIRC) and the PBOC. Beginning with the *Vanke-Baoneng* case, it is thought that there are problems in the Chinese financial regulatory framework, including systemic risks, regulatory vacuum and regulatory arbitrage as well as consumer protection. The UK has established a 'twin-peak' regulatory architecture marked by the PRA and the FCA through the Financial Services Act 2012. There are mainly three aspects that China could learn from the UK: (1) an integrated regulatory structure; (2) coordination mechanisms; (3) enhancement of consumer protection. Each part above is equipped with detailed measures to cope with the current flaws. It is expected that such suggestions could work for China's reform, whilst based on the characteristics of China's progressing financial market.

In this highly integrated global financial system, China's status in the world economy continues to rise, and its financial market is undergoing tremendous change, demanding a more rational regulatory regime. In addition, from 2007 to 2009, an unparalleled financial crisis triggered by the US subprime mortgage crisis swept the globe,[1] exposing the intrinsic flaws in Chinese supervision architecture. Despite some reforms in 2018, the system remains problematic. By contrast, the financial regulatory system in the UK has its unique advantages, which are worth learning for China. This essay will argue that Chinese financial regulatory architecture is defective and recommends a new structure with Chinese characteristics. The essay will be divided into four parts. The first section will expound the historical development of the Chinese financial supervision system. The second section will analyse three challenges faced by the Chinese regulatory system. The third section will briefly introduce the UK regulatory scheme, while the last section will scrutinise how China could learn from UK's experience.

Chinese financial regulatory structure

Before the 1990s, China adopted a unified financial regulatory scheme, with the People's Bank of China (PBOC) as the sole regulator responsible for supervising all financial activities. However, from 1993 to 2017, China shifted to a sectoral or institutional financial supervision model, in which banking, insurance and securities were separately regulated by the China Banking Regulatory Commission (CBRC), the China Insurance Regulatory

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[1] Walter Molano, 'Economic Crisis and the BRIC Countries' (2009) 8 J Int'l Bus & L 17.

Commission (CIRC), and the China Securities Regulatory Commission (CSRC). All of these agencies were directly under the leadership of the State Council,[2] and charged with micro-prudential regulation and conduct regulation.[3] The reformed PBOC was not only responsible for jointly overseeing the banking sector with the CBRC, but also for formulating monetary policies, preventing financial risks and safeguarding financial stability.[4] Similar to central banks in other countries, the PBOC was also entrusted with functions such as anti-money laundering, administrating foreign exchange market, monitoring the gold market, and maintaining normal operation of payment and settlement systems.[5] However, with the emergence of cross-market financial conglomerates and products, the traditional boundaries between financial institutions began to blur, and such dispersed regulatory regime gradually failed to supervise cross-sector financing business.[6] The main reason was thought to be that these regulators did not exchange information and issued instructions independently, ultimately resulting in inconsistent or contradictory instructions.[7]

In order to orientate to the trend of financial integration, China launched the reform of financial supervision landscape from 2017.[8] Compared with the previous system of 'one bank and three commissions', the new system of 'one committee, one bank and two commissions' has three major changes.[9] Firstly, with the ambition to coordinate the financial policies and oversight activities, the Financial Stability and Development Committee (FSDC) was established within the State Council.[10] Secondly, the CBRC and the CIRC were merged to form the China Banking and Insurance Regulatory Commission (CBIRC), tasked with micro-prudential and conduct supervision of the banking and insurance sectors across the country.[11] The CBIRC would also participate in formulating strategic plans for the reform and development of the financial industry, drafting important laws and regulations for the banking and insurance industries, and basic rules on financial consumer protection.[12] By contrast, the CSRC remains largely unchanged in this reform and remains responsible for supervising and administering national securities and futures markets.[13]

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[2] The State Council, that is, the Central People's Government of the People's Republic of China, is the executive body of the highest organ of state power; it is the highest organ of state administration.
[3] Daniel Calvo and others, 'Financial Supervisory Architecture: What Had Changed after the Crisis?' (FSI Insights on policy implementation No 3, Bank for International Settlement 2018).
[4] Law of the People's Republic of China on the People's Bank of China, art 2.
[5] Law of the People's Republic of China on the People's Bank of China, art 4.
[6] Jia Chen and Yu Wang, 'Financial Regulatory Reform to Be Expanded' *China Daily* (Beijing, 3 March 2018) <english.www.gov.cn/news/top_news/2018/03/03/content_281476064626040.htm> accessed 9 March 2022
[7] Wei Shi, Kang Qu and Zhenbo Hou, 'The Experience of Unified Financial Supervision in Britain and Suggestions for Reform of Financial Supervision System in China' (2016) 7 International Finance 3
[8] Damian Tobin and Ulrich Volz, 'The Development and Transformation of the Financial System in the People's Republic of China' (ADBI Working Paper Series) 825/2018, 5 <adb.org/sites/default/files/publication/411136/adbi-wp825.pdf> accessed 9 March 2022.
[9] Jing He and Kebin Deng, 'Seesaw Effect and Financial Risk Prevention and Control -- Also on the significance of innovation in the new regulatory pattern of "The First Committee and the Two Sessions"' (2019) 3 Economist 81.
[10] Xinhua, 'China Establishes Financial Stability and Development Committee' *China Daily* (Beijing, 9 November 2017) <english.www.gov.cn/news/top_news/2017/11/08/content_281475936107760.htm> accessed 9 March 2022.
[11] Provisions on the Functions, Structure and Staffing of the China Banking and Insurance Regulatory Commission, art 3(3).
[12] Provisions on the Functions, Structure and Staffing of the China Banking and Insurance Regulatory Commission, art 3(2).
[13] Provisions on the Functions, Structure and Staffing of the China Securities Regulatory Commission, art 2

Thirdly, the status of the PBOC has been enhanced. In addition to its original functions, the PBOC has been newly appointed to take the lead in drafting important laws and regulations on banking and insurance industries. That the General Office of the FSDC is set up within the PBOC and the Chairman of the CBIRC doubles as the Party Secretary of the PBOC also illustrate the growing position of the PBOC in financial regulation. However, it should be emphasised that the PBOC is a constituent department of the State Council, while the CBIRC and the CSRC are institutions directly under the State Council. Although the PBOC is higher in hierarchy than the CBIRC and the CSRC, there is no direct affiliation between them. Nevertheless, despite these improvements, further reforms are still needed since the regulatory structure still adheres to the institutional approach and the regulatory predicament remains unresolved.

The dilemma of Chinese financial regulatory system

The *Vanke-Baoneng* case concerned a prolonged hostile takeover bid and can be used to illustrate the deficiencies in the Chinese financial regulatory architecture. Vanke was one of the largest real estate developers in China and the Baoneng Group was an activist investor. From mid-2015, Baoneng invested in Vanke through securities market, but with funds from banks and insurance companies,[14] Baoneng adopted multiple financing means encompassing stock pledge, securities margin trading and asset management plans to avoid the supervision of the regulatory bodies.[15] For example, pursuant to the CBRC rules, funds from banking wealth management products were not allowed to be invested in the securities market.[16] However, CHINA ZHESHANG BANK CO., LTD, a backer of Baoneng, circumvented this rule by placing its wealth management products funding in Huafu Securities Co., Ltd., Minmetals International Trust Co., Ltd. and Zhebao Funding Co. Ltd., before putting them into the securities market.[17] The same was true for insurance funds to avoid the supervision of the CIRC. Eventually, through this sequence of actions Baoneng managed to evade all regulatory oversight. Arguably, this battle has clearly proved that a sector-based regulatory structure might not be suitable to handle interconnected financial activities. Specifically, it reflects inadequate information exchange and interagency coordination among regulators, which enable business activities that could increase systemic risk, such as Baoneng's leveraged financing. Further, the regulatory vacuum within the financial regulatory system leaves space for regulatory arbitrage. Third, it is difficult to protect consumers. The following sections will analyse these three challenges encountered in detail.

Systemic risk

It is argued that the Chinese financial regulatory regime is not effective in preventing systemic risks. Systemic risk generally refers to the probability that one or more financial events could incur acute instability or collapse of the entire economy.[18] Although micro-

[14] Hong Qi, 'Financial Supervision under Mixed Operation and Financial Innovation in China from the Perspective of Vanke-Baoneng Case' (2017) 3 Southwest Finance 45.
[15] Xiaodong Tang, Bohong Zheng and Haoliang Luo, 'The Process, Focus and Research Objective of Vanke-Baoneng Case' (2016) S1 Tsinghua Financial Review 27.
[16] Notice of the China Banking Regulatory Commission on the Relevant Issues concerning Further Regulating the Investment Management of the Personal Financial Management Business of Commercial Banks, CBRC〔2009〕65, published 6 July 2009; Measures for the Supervision and Administration of the Wealth Management Business of Commercial Bank, CBIRC〔2018〕6, published 26 September 2018.
[17] Tang, Zheng and Luo (n 15) 27.
[18] George G. Kaufman and Kenneth E. Scott, 'What Is Systemic Risk, and Do Bank Regulators Retard or Contribute to It?' (2003) 7 The Independent Review 371.

prudential policies are concerned with the stability of individual firms and macro-prudential policies are concerned with the stability of the financial system as a whole,[19] information-sharing is considered indispensable for monitoring risks.[20] However, under the current institutional regulatory structure, the PBOC takes charge of macro-prudential regulation without knowing the specifics of financial business, while the CBIRC and the CSRC operate within their respective domains without interfering with each other. It should be admitted that information exchange and interagency coordination are insufficient.[21]

Under these circumstances, mixed financial holding companies could utilise affiliates governed by different regulators to achieve certain economic benefits.[22] Further, it would be unfeasible for the PBOC, the CBIRC or the CSRC to correctly predict or identify,[23] since each of them only have access to information in their own field, rather than comprehensive information pertaining to all activities of any particular financial entity.[24] Therefore, owing to the information-exchange barrier between the regulators, systemic risks could not be effectively prevented.

Regulatory vacuum and regulatory arbitrage

There is a regulatory vacuum in the Chinese structure, which would provide opportunities for regulatory arbitrage to a certain extent.[25] Regulatory vacuum, an incentive for financial risks, involves uncertainty about which regulators are responsible, which regulators should take the leading role and how their actions should be coordinated.[26] It refers to 'those financial transactions designed specifically to reduce costs or capture profit opportunities created by differential regulations or laws'.[27] Exploiting regulatory vacuum to acquire undue profits might cause damage to the normal financial order. It is conceivable that giant financial groups could utilise regulatory gaps to transfer assets between various financial sectors, thereby avoiding restrictive provisions, escaping supervision and grabbing huge profits. For example, although the CBRC (now the CBIRC) stipulated that funds from banking wealth management products were prohibited to invest on the securities market,[28] Baoneng transferred the funds from wealth management products of Zheshang Bank to a financial channel, that is, an asset management plan operated by Huafu Securities Company, before using it on the securities market. Through this channel, Baoneng managed to escape the supervision of both the CBRC and the CSRC and get unjustifiable interests.

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[19] Frédéric Boissay and Lorenzo Cappiello, 'Micro- versus Macro-Prudential Supervision: Potential Differences, Tensions and Complementarities' (2014) 1 Financial Stability Review 135

[20] The People's Bank of China, 'Macroprudential goals, implementation and cross-border communication' (BIS Papers No 94, 2018)

[21] Group of Thirty, *The Structure of Financial Supervision: Approaches and Challenges in a Global Marketplace* (2008) <legco.gov.hk/yr08-09/english/panels/fa/papers/fa0223cb1-837-3-e.pdf> accessed 13 March 2022

[22] Ewa Kruszewska, 'Target Board's Conduct and Shareholders Rights in the Context of Hostile Takeovers in China: A Case Study of Vanke v Baoneng' (2017) University of Edinburgh, 18 <ssrn.com/abstract=3385975> accessed 9 March 2022

[23] OECD Organisation for Economic Co-operation and Development, *OECD Reviews of Regulatory Reform China: Defining the Boundary between the Market and the State* (OECD Publishing, 2009)

[24] Ibid.

[25] Deirdre M. Ahern, 'Regulatory Arbitrage in a FinTech World: Devising an Optimal EU Regulatory Response to Crowdlending' (2018) European Banking Institute Working Paper Series 24/2018, 1 <ssrn.com/abstract=3163728> accessed 10 March 2022

[26] Andrew Godwin, Guo Li and Ian Ramsay, 'Is Australia's Twin Peaks System of Financial Regulation a Model for China (Part 1)' (2016) 46 Hong Kong LJ 621

[27] Frank Partnoy, 'Financial Derivatives and the Costs of Regulatory Arbitrage' (1997) 22 J. CORP. L. 211

[28] Boissay and Cappiello (n 19).

Failure to protect consumers

It could be argued that Chinese financial regulatory structure fails to provide adequate protection for consumers. Consumers are an essential component of the financial market as they provide capital for its operation. However, consumers might sustain severe monetary losses due to the systemic risk of complex financial networks and the information asymmetry in financial services, prompting regulators to provide them with corresponding protection.[29] With regard to systemic risks, since financial firms are interdependent, a failure in one of them could trigger a chain reaction and cause loss to the funds of the innocent consumers.[30] In terms of information imbalance, some unscrupulous financial service providers would induce consumers who lack the ability to understand complicated contracts to purchase financial products, and then utilise the funds gathered to chase risky high profits, thereby ultimately incurring damage to consumers.[31]

Note that although consumer protection is desirable, Chinese regulatory regime has paid little attention to this important area. In China, there is no single department responsible for consumer protection in all financial industries. Instead, the PBOC, the CBIRC and the CSRC have established specialised consumer protection agencies respectively. The Financial Consumer Protection Bureau, instituted within the PBOC, assumes the responsibility of researching consumer protection schemes.[32] The CBIRC and the CSRC have set up the Consumer Protection Bureau of CBIRC and the Consumer Protection Bureau of CSRC severally, responsible for consumer protection in banking, insurance and securities industries respectively.

However, this agency configuration is problematic in two aspects. First, the financial consumer protection law is absent. In China, the main source that could be referenced for consumer protection is the Law of the PRC on the Protection of the Rights and Interests of Consumers, but this legislation is excluded from the financial sector. It is noteworthy that China has so far no laws on financial consumer protection. Instead, schemes concerning financial consumer protection are scattered around statutes, including the Securities Act and the Insurance Act. Taking the 'Crude Oil Treasure' event[33] as an example. 'Crude Oil Treasure' was a derivative business under the regulation 'Measures for The Administration of Derivatives Trading Business of Banking Financial Institutions' - which allowed retail investors to engage in derivatives banking transactions. However, this regulation did not actually comply with the rules made by the CSRC and other relevant regulations. Consequently, the interests of investors were at stake. Accordingly, it is urgent to establish a consolidated regulation of financial consumer protection law.

Second, in this increasingly integrated financial situation, the disputes relating to consumer losses are likely to involve multiple financial industries. Consequently, consumer protection

[29] Iain MacNeil, 'Consumer Protection: Financial Innovation and Product Intervention' (2012) 6 Law & Fin Mkt Rev 91.
[30] Mattia Montagna, Gabriele Torri and Giovanni Covi, 'On the Origin of Systemic Risk' (2020) European Central Bank Working Paper Series No 2502, 4 <papers.ssrn.com/sol3/papers.cfm?abstract_id=3749361> accessed 13 March 2022.
[31] FSA, *Product Intervention* (DP11/1, January 2011) para 3.7.
[32] 'Department Brief' (Financial Consumer Protection Bureau of The People's Bank of China) <pbc.gov.cn/jingrxfqy/145720/145821/index.html> accessed 12 March 2022.
[33] 'Crude Oil Treasure' is a financial product provided by the Bank of China to promote the service of crude oil futures for domestic retail investors. On April 20th in 2020, the product suffered as the May contract for West Texas Intermediate saw a plunging price at -$37.63 per barrel. This triggered the so-called 'Crude Oil Treasure' event, which caused huge loss to investors and the Bank of China.

agencies, which are established based on separated supervision, would not be able to effectively protect consumers. For example, in the *Vanke-Baoneng* case, Zheshang Bank utilised the funds of consumers to illegally invest on the securities market. If the investment fails, the money would not be returned to the bank, ultimately causing losses to consumers. In this case, since agencies operate on an industry basis, while the investment is a cross-industry one, the interests of consumers would be difficult to protect.[34]

British financial regulatory structure

It is thought that the UK financial supervision structure would be worth learning from for China. After the 2008 financial crisis and the collapse of Northern Rock, the UK Authority was deeply conscious that a single regulatory, more specifically, the Financial Services Authority, was incapable of bearing all supervising responsibilities.[35] Therefore, the UK introduced the Financial Services Act 2012 and established a 'twin-peak' regulatory architecture,[36] mainly concentrating on institutional design and responsibility allocation.[37] Under this framework, the Bank of England (BoE), the central bank of the UK, assumes the responsibility for stabilising the economy.[38] The Financial Policy Committee (FPC), founded within the BoE, is entrusted with macro-prudential regulation.[39] The Prudential Regulation Authority (PRA), a subsidiary of the BoE, is charged with micro-prudential supervision of systemically important financial institutions including deposit takers, insurance companies and significant investment firms.[40] The PRA aims to achieve the safety and soundness of the regulated entities.[41] By contrast, the Financial Conduct Authority (FCA), accountable directly to HM Treasury and Parliament, is not only the prudential supervisor of all institutions except those overseen by the PRA, but also responsible for regulating the business conducts of all financial firms.[42] The FCA seeks to maintain market competition and protect consumers.[43] The following sections will discuss how China could learn from the UK's experience and alleviate the disadvantages of its financial regulatory structure.

Enlightenment and reforms proposals

Exploring an integrated regulatory structure

China implements separate regulatory structure based on financial industries, which, under the background of mixed operation of financial holding companies, has caused a series of problems including systemic risk, regulatory vacuum and regulatory arbitrage. By contrast, the UK has adopted the integrated supervision model made up of the PRA and the FCA.[44]

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[34] Qi (n 14).
[35] FSA, *The Turner Review: A Regulatory response to the Global Banking crisis* (March 2009).
[36] Jeremy Hill and Edite Ligere, 'The UK's New Financial Services Regulatory Structure – The Shape of Things to come' (2013) 38(4) JIBLR 156.
[37] HM Treasury, *Call for Evidence: Regulatory Coordination* (Financial Services Future Regulatory Framework Review, July 2019), para 1.7.
[38] Robert Purves, 'The Regulation of Banks' in John Odgers QC (ed), *Paget's Law of Banking* (15th edn, LexisNexis Butterworths 2018).
[39] Alexander Dill, *Bank Regulation, Risk Management, and Compliance: Theory, Practice, and Key Problem Areas* (Routledge 2020).
[40] Eilis Ferran, 'The Break-up of the Financial Services Authority' (2011) 31(3) Oxford Journal of Legal Studies 455.
[41] FSMA 2000, s.2B (2).
[42] Anu Arora, *Banking Law* (Pearson 2014).
[43] FSMA 2000, s.1B (2).
[44] Purves (n 38).

It is widely believed that a unified regulatory structure could assist in monitoring systemic risks, filling regulatory vacuum and restraining regulatory arbitrage. Therefore, China should gradually develop towards to the direction of this integrated supervision model.

However, this does not mean that China should simply merge the CBIRC and the CSRC to form a new regulator like the FSA. The failure of the Northern Rock Bank has proved that a single regulator model is not suitable for the modern financial market. Rather than directly merging the CBIRC and the CSRC, it is advised that some experimental mergers could be firstly carried out to explore a suitable way forward for China. For example, the power of micro-prudential regulation held by the CBIRC and the CSRC could be granted to the PBOC. In this way, the PBOC could have the centralised functions of both micro and macro prudential regulation, while the CBIRC and the CSRC could specifically take charge of conduct regulation. In addition, given the fact that there is no unified institution to protect consumers' interests, it is proposed that the financial consumer protection agencies of the CBIRC and the CSRC could be merged to found a Consumer Protection Bureau to deal exclusively with consumer protection issues.

Coordination mechanisms

Compared with China, the coordination mechanisms between financial regulators in the UK are relatively pragmatic and sophisticated. On the one hand, the PRA and the FCA have a statutory duty to coordinate their oversight activities.[45] Specifically, most regulatory issues concerning dual-regulated companies would require the consent, or at least consultation, of them.[46] The PRA and the FCA are also legally obligated to sign a Memorandum of Understanding (MOU) on how to carry out their supervisory functions.[47] Additionally, the director-level officials of these two bodies are required to hold quarterly meetings to interchange views and information pertaining to conduct developments that possibly affect capital.[48] The PRA could also veto the FCA actions that might be detrimental to financial stability.[49] On the other hand, the PFC within the BoE has the power to provide the PRA and the FCA with directions and recommendations on systemic issues on a 'comply or explain' basis.[50] The cross-membership between the FPC and the boards of the PRA and the FCA has also been considered a constructive device to ensure information flow and policy consistency.[51]

Through the mechanisms mentioned above, information sharing and functional coordination among UK financial regulators have been well intensified. Therefore, it is recommended that China could use their advantages for reference. Specifically, the CBIRC and the CSRC could also establish a MOU system and veto system. Notably, as a specialised agency for coordinating regulatory activities within the State Council, the FSDC should take the lead

[45] HM Treasury, *A New Approach to Financial Regulation: Securing Stability, Protecting Consumers* (Cm 8268, January 2012) para 5.4.
[46] Clifford Chance, *UK Regulatory Reform: Adapting to the new approach to regulating insurers* (May 2012)
[47] Andromachi Georgosouli, 'The FCA-PRA Coordination Scheme and the Challenge of Policy Coherence' (2012) 8(1) Capital Markets Law Journal 62.
[48] International Monetary Fund and Monetary and Capital Markets Department, United Kingdom: Financial Sector Assessment Program-Basel Core Principles for Effective Banking Supervision- Detailed Assessment Report (IMF Staff Country Report No 16/166, June 2016).
[49] Ibid.
[50] HM Treasury, *The Financial Services Bill: the Financial Policy Committee's Macro-Prudential Tools* (Cmd 8434, 2012) para 3.21.
[51] Financial Stability Board, *Peer Review of the United Kingdom* (Review Report, 2013).

in the interdepartmental linkage system. For example, in terms of its personnel composition, the FSDC could be chaired by a member of the Standing Committee of the Political Bureau, while the governor of the PBOC could be the vice-chairman. The other members could be partly selected from the boards of the CBIRC and the CSRC.[52] In addition, the FSDC should arrange regular meetings among the director-level officials of all supervisory agencies, providing a platform for information exchange and discussion of major financial issues.[53]

Strengthening consumer protection

As previously shown, China is less effective in consumer protection than the UK. Under the UK financial regulatory framework, the mission of protecting consumer is entrusted to the FCA;[54] given statutory powers to actively step in.[55] Numerous safeguarding measures have already started. For example, the Consumer Redress Scheme would compel companies to investigate their previous business practices, ascertain whether their breaches of legal obligations have led consumers to suffer loss and, if so, to pay redress.[56] The Money Advice Service is established to arrange personal finance educational courses and provide consumers with sound advice and annual finance health audit services.[57] The Financial Services Compensation Scheme acts as the fund of last resort to reimburse consumers who have not been compensated sufficiently by firms, attempting to prioritise consumers' legitimate interests.[58]

The most noteworthy service, the Financial Ombudsman Scheme, aims to address disputes concerning a minimum amount (often less than £355,000) arising between companies and consumers.[59] With its own separate funds and institutions, the Ombudsman can not only transfer abstruse legal rules into straightforward terms,[60] but also follow the standard of fairness and reasonableness to adjudicate such cases.[61] Unlike judicial procedures emphasising strict compliance with legal norms, such a standard enables the Ombudsman to sidestep technical legal issues and make decisions on the basis of a balance of interests, which also prevents precious judicial resources being abused.[62] In addition, the scope of a 'consumer' has been enlarged, involving not only retail consumers but also anyone associated with a supervised activity.[63] This makes it possible to ensure that all parties engaging in such events would be entirely protected, thus attracting more investment to boost commercial vitality. In a word, the essence of these strategies in the UK is that the tasks of consumer protection should be divided into parts in more details.

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[52] Kathy Yuan and others, 'A financial regulatory regime reform template to ensure financial stability for the Chinese economy' (2018) Tsinghua University National Institute of Financial Research Paper 14/2018, 34 <pbcsf.tsinghua.edu.cn/Upload/file/20180528/20180528094312_8064.pdf> accessed 10 March 2022.
[53] Ibid.
[54] FSMA 2000, s.319(6).
[55] Betsy Dorudi et al, 'United Kingdom regulatory reform: emergence of the twin peaks' (2012) 95 COB 1.
[56] Christopher Hodges, 'Mass Collective Redress: Consumer ADR and Regulatory Techniques' (2015) 23 Eur Rev Priv Law 829.
[57] Dorudi and others (n 55) 19.
[58] Richard O'Brien, 'The Limits of Judicial Deference to Decisions of Regulatory Bodies: R (Emptage) v Financial Services Compensation Scheme' (2013) 18 Jud Rev 109
[59] Arora (n 42) 195.
[60] Iain MacNeil, 'Consumer Dispute Resolution in the UK Financial Sector: The Experience of the Financial Ombudsman Service' (2007) 1 Law & Fin Mkt Rev 515.
[61] Gary Meggitt, 'An Independent Insurance Authority for Hong Kong' (2012) 7 J Comp L 258.
[62] Caroline Mitchell, 'The Financial Ombudsman Service – A Fair and Reasonable Alternative to the Court' (2011) 3/4 Eur J Commer Contract Law 65
[63] Dorudi and others (n 55) 15.

Therefore, considering that there have been inner consumer protection bureaus in the CBIRC and CSRC, the first step is to design new enforcement rules to enhance their effectiveness to adapt to the already existing regime.[64] It is suggested that firstly the PBOC should incorporate the duty of consumer protection into the scope of macro-prudential regulation, emphasising the importance of this task to the CBIRC and CSRC.[65] In the meantime, specific parts of consumer protection for different institutions should be clarified by legal authority in order to pinpoint the dispute settlement mechanism.[66] For example, in terms of compensation scheme, the methods of calculating the amount and the institution that enforces such policies should be strictly scrutinised.

Given that the online financial business has flourished rapidly, it is proposed that a raft of detailed rules concerning innovative fields are created, covering the extent to which people invading others' rights should be punished, the disclosure of information about the risk and model of a defined product[67] as well as the standard of how to treat consumers fairly.[68] Furthermore, the task of educating consumers should be underlined given the fact that many people engage in the market, merely following the trend.[69] There is an urgent need to provide consumers especially in poor regions and vulnerable groups with sufficient consultation services,[70] for example, the way that financial system runs and how potential risks arise. If, in the future, the current structure does not work desirably, even with strong policies, a separate organisation professionally centering on consumer protection could be established.[71] It could work cooperatively with the existing institutions and cover all business lines.

Conclusions

In conclusion, this essay has demonstrated that although the Chinese financial supervision scheme has experienced reforms in 2018, there are still deficiencies in mitigating systemic risk, preventing regulatory vacuum and protecting consumers. Through the analysis of the UK regulatory system, it is proposed that the Chinese regime could develop towards the direction of integrated regulatory structure, strengthen interagency coordination and enhance protection for consumers by subdividing tasks. Such development should also be based on the characteristics of China's financial market.

[64] Zhiqiang Huang, 'The New Architecture and Inspiration of Financial Regulation Reform in Britain' [2012] Studies of International Finance 19
[65] Biyun Ren and Gaoqing Xu, 'Thoughts on the Perfection of Business Conduct Supervision of China's Financial Institutions' [2020] Economic Review 43
[66] Yunsong Xu, 'Research on the Construction and Development of the Behavioural Supervision System in China: International Experience and Reference' (2016) 8 Credit Reference 15
[67] Ren and Xu (n 65) 48.
[68] Fengyu Li and Min Weng, 'The Legislative Reform of Financial Regulation System in Britain and the Inspiration for China' (2014) 11 Southwest Finance 51
[69] Huang (n 64) 24.
[70] Xu (n 66) 23.
[71] Huang (n 64) 24.

PROPERTY LAW

Can overriding interests and the Crack on the Mirror principle be reconciled?

Dai Qingmei*

Introduction

After the Land Registration Act (LRA) 1925 was established, a universal system of land registration was created. This requires details relating to parcels of land to be recorded by registration.[1] The LRA 2002 was later introduced to modify the drawbacks of the 1925 legislation.[2] Despite these modifications, the doctrine of overriding interests, interests which are not recorded on the register but nonetheless bind the land and its intended purchasers,[3] remain a substantial obstacle in achieving a conclusive system of land registration and, according to Harpum, means that the system itself cannot be as "efficient, certain and just as was intended".[4]

This essay will explore the doctrine of overriding interests by critically examining the conflicts between existing land law principles and overriding interests, detailing the changes introduced by the LRA 2002 to ameliorate some of these issues, and analysing why overriding interests were not completely removed from the LRA 2002 as well as the justifications for their retention. Overall, the article will agree with Harpum and argue that, although the LRA 2002 reduced the negative effects of overriding interests in some respects further reform is needed. Accordingly, possible solutions for reform will be posited.

The Land Registration System and overriding interests

The land registration system was introduced in 1925 to eliminate the obstacles caused by the previous system of title to land, particularly the system relying on the title deeds. Historically, title to land needed to be proved by title deeds, an inherently problematic system due to the potential for such documents to be misplaced or lost by landowners, resulting in possible failure to provide good title to land.[5] Moreover, relying on title deeds to prove title to land was wearisome and intricate because of the repeated examination of the same title.[6] This rendered the conveyancing process complicated and lengthy.[7]However, the 1925 Act was also criticised as being unsatisfactory and unfair, largely due to the operation of the doctrine of notice whereby an individual with an equitable interest in the land would have that interest "swept off" the land if the purchaser was a *bona fide* purchaser of the legal estate for value without notice.[8] Consequently, the LRA 2002 was established, aimed at achieving "faster, cheaper and more reliable dealings" in relation to the conveyancing and ownership of land.[9]

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[1] N. Gravells, *Land Law: Text and Materials* (2nd edn, Sweet& Maxwell 1999).

[2] M.J. Prichard, 'Registered Land—Overriding Interests—Actual Occupation' (1979) 38 Cambridge Law Journal 254.

[3] Law Commission, *Updating the Land Registration Act 2002* (Law Com No 380).

[4] C Harpum, *The Law of Real Property* (8th edn, Sweet & Maxwell 2021) 151.

[5] Paul Richards, *Land Law* (Pearson 2014).

[6] *Williams Glyn's Bank Ltd v Boland* [1981] AC 487, per Scarman LJ.

[7] E. Dowson and V. Sheppard, *Land Registration* (2nd edn, HM Stationery Office, 1968).

[8] Richards (n 5) 59.

[9] S. Cooper, 'Equity and Unregistered Land Rights in Commonwealth Registration Systems' (2003) 3(1) Oxford University Common Law Journal 198, 201.

In order to reach this objective, the 2002 Act was underpinned by three fundamental principles: the mirror principle, the curtain principle and the insurance principle.[10] The mirror principle aims to ensure an efficient and reliable register of land ownership by requiring the register to accurately and conclusively reflect the ownership and interests relating to the land.[11]Under the curtain principle, purchasers need not concern themselves with the rights behind entries on the register in order to ensure the system is less complicated for prospective purchasers.[12] The insurance principle encapsulates the notion that registered title is guaranteed by the State by providing statutory indemnity for any errors made in relation to registration.[13] Based on these fundamental principles, the LRA 2002 was founded with the purpose of reflecting land ownership more completely and precisely than its predecessor.[14]

Despite the improvements introduced by the LRA 2002, the Act was criticised for retaining the doctrine of overriding interests. Overriding interests are not recorded in the Land Register, but are, nonetheless, binding on purchasers, therefore representing a "crack" in the mirror principle and ultimately undermining the construction of a "trustworthy record".[15] Moreover, they are discoverable only by the prospective purchaser making enquiries regarding any such attached interests, or physically inspecting the property, thus undermining the curtain principle.[16] Furthermore, overriding interests present an obstacle to electronic conveyancing that aims to expedite and streamline the conveyancing process with accuracy.[17] The doctrine therefore conflicts with the stated fundamental principles of the land registration system and thus hinders the system from fully achieving its legislative intent. Because the existence of unregistered but binding rights undermines and damages the mirror principle, Dworkin insists that overriding interests should ultimately be abolished or significantly reduced.[18]

However, calls for the abolition of overriding interests were rejected by the Law Commission, who stated that requiring individuals to protect their interests by registering them would be unreasonable.[19] Further reasons posited against abolition were that overriding interests could not be registered in certain circumstances because the interest holder may not realise the existence of such an interest in their favour.[20] Despite not being abolished by the LRA 2002, the Act sought to minimise the impact of overriding rights by reducing the number of potential overriding interests and limiting the effect of the remaining ones.[21] For instance, rights of adverse possession cannot be enforced as overriding interests

[10] S King, *Beginning Land Law* (Routledge 2015).
[11] Richards (n 5).
[12] M Dixon, *Modern Land Law* (7th edn, Routledge 2010) 34.
[13] Ibid, 35.
[14] Law Commission and HM Registry, Land Registration for the Twenty-first Century: A Conveyancing Revolution (Law Com No 271, 2001) para 2.24.
[15] *National Provincial Bank Ltd v Hastings Car Mart Ltd* [1964] EWHC 9
[16] Richards (n 5) 128.
[17] Ibid, 142.
[18] G. Dworkin, 'Registered Land Reform' (1961) 24 Morden Law Review 135.
[19] Law Commission and HM Registry, Land Registration for the Twenty-first Century: A Consultation Document (Law Commission No. 254, 1998).
[20] Ibid.
[21] Dixon (n 12) 41.

unless the first registered proprietor had notice of them, which implies that squatters by adverse possession no longer exist.[22]

Additionally, paragraphs 10-14 of Schedules 1 and 3 set out that overriding interests such as franchises, manorial rights, rents reserved to the Crown and non-statutory rights would be phased out in ten years since the LRA 2002 was enacted. However, a period of 10 years was introduced to avoid the removal of such interests contravening the Human Rights Act 1998. Besides, overriding interests of shorts leases, interest of persons in actual occupation, and easements were narrowed down and redefined in the LRA 2002.[23]

Schedule 1 of the 2002 Act relates to interests that override first registration while Schedule 3 focuses on subsequent dealings with the property. The scope of Schedule 3 is also narrower in relation to enforceability and priority.[24] Since actual occupation is one of the key overriding interests in Schedule 3 and is thought to be the "most sweeping and most often litigated one", [25] the related legislation and cases should be discussed. Various cases have clarified that a person's actual occupation could not satisfy the demand of overriding interest without an interest in the land,[26] which ought to be a proprietary interest instead of a personal right (such as a marriage relationship[27] or a licence).[28] Moreover, overriding interests of persons in actual occupation are now restricted to them having "physical presence" on the land[29] or an "intention to occupy".[30] It should be emphasized that Schedule 3 underlines instances in which actual occupation might fail to be binding if the occupation would "not have been obvious on a reasonably careful inspection of the land prior to the disposition" or if the person in actual occupation did not reveal the interest when asked about it.[31]

The limitations imposed by the LRA 2002 seem to be reasonable and practical, yet there are various concerns. First, the test of intention is thought to be unverifiable and opaque, and the extent to which courts should rely on "intention" to determine actual occupation remains ambiguous.[32] Second, it is assumed that the definition of "reasonably careful inspection" is subjective, which may lead to uncertainty in its interpretation.[33] Thus, although the LRA 2002 remedied concerns of the LRA 1925 to some degree, there are still difficulties when adapting the law of land registration.

Although the retention of overriding interests in the LRA 2002 has been subject to criticism, the justification for their continued existence is to secure the specific interests of individuals who cannot be reasonably expected to register every right they may have in land.[34] From the perspective of persons in actual occupation, the potentially vulnerable position of these

[22] Richards (n 5) 143.
[23] Richards (n 5) 143.
[24] Richards (n 5) 128.
[25] Harpum (n 4) 203.
[26] Caswell (n 21).
[27] *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175.
[28] Caswell (n 21).
[29] Boland (n 6).
[30] *Thompson v Foy* [2009] EWHC 1076.
[31] LRA 2002 Schedule 3, para 2.
[32] Barbara Bogusz, 'The relevance of intentions and wishes to determine actual occupation: a sea change in judicial thinking?' (2014) 1 Conveyancer and Property Lawyer 27.
[33] Dixon (n 25) 13.
[34] Bogusz (n 32).

persons must be acknowledged and therefore protecting their overriding status is important.[35] This is particularly evident in cases such as *Chhokar*,[36] where it was held that the wife, whose husband held the sole legal title to the house they shared and sold the property when she was giving birth to their baby in the hospital, should be protected by the court by recognising her overriding interest. It can also be seen in *Bustard,*[37] that without the protection of overriding interests, Mrs. Hussein would have lost her home. On the other hand, the interests of intended purchasers should also be considered. In this regard, the LRA 2002 introduced a policy of encouraging people to register any known overriding interest they may have in land, thus strengthening the certainty and reliability of the registration system[38]

Nevertheless, a considerable number of overriding interests remain, as individuals refuse to follow this policy.[39] Human rights should also be considered in the issue of overriding interest. Under the European Convention on Human Rights 1950, individuals are entitled to enjoy peaceful possession of their land without being deprived by others.[40] In *Beaulane*, it was argued that adverse possession might result in the destruction of title and therefore contradict the Convention.[41] Although a similar appeal was rejected by the court in *Pye*,[42] it remains uncertain for courts to take the Human Rights Convention into consideration because of the slim four-three majority at first instance.

Conclusion

In conclusion, this essay has supported the opinion that the overriding interest results in a crack to the registered system and hinders it from achieving its objectives, despite the LRA 2002 making some modifications. After introducing the doctrines of registered land and the overriding interest, this essay has analysed the conflicts between them and how the LRA 2002 developed to eliminate the conflicts. Further, this essay has suggested that the LRA 2002 could not practically enable the registration system to become as efficient, certain and just as was supposed. Finally, three justifications have been given, including protection for vulnerable people, encouragement about registering overriding interests, and reference to the Human Rights Convention. From this, it is clear that although further reform may be necessary to make the law in relation to overriding interests clearer, they are necessary in order to protect the interests of vulnerable individuals and therefore their retention in the LRA 2002 is justified.

[35] Bogusz (n 32).
[36] *Chhokar v Chhokar* [1984] Fam Law 269.
[37] *Link Lending Ltd v Bustard* [2010] EWCA 424.
[38] LRA 2002, s. 71.
[39] Dixon (n 12) 42.
[40] European Human Rights Convention on Human Rights 1950, Article 1, Protocol 1.
[41] *Beaulane Properties v Palmer* (2005) EWHC 817.
[42] *Pye (Oxford) Ltd. v United Kingdom* (2008) 46 EHRR 45.

EQUALITY LAW

Harassment at work: is the law failing?

Demi Clarke-Jeffers*

Introduction

Even in 2022, Black and Muslim women still endure harassment within the workplace, specifically in relation to their naturally textured hair or respecting their religious practice of covering up their hair. In addition, they have to endure comments, jokes and overall harassment within the workplace, which they experience due to what they choose to do with their hair.

Arguably, these issues can be remedied through the law of discrimination, but whilst there are overlaps between harassment and discrimination, this aspect of discrimination does not always cover the constant remarks that are normalised and shrugged off by employees and employers. Thus, neither direct nor indirect discrimination sufficiently or fully compensate the feelings of humiliation and degradation suffered in these cases.

The definition and scope of harassment

Section 26 of the Equality Act 2010 applies to all protected characteristics: age, disability, gender reassignment, race, religion or belief, sex, and sexual orientation. Specifically, harassment can be defined as follows:

> A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

Two protected characteristics will be a central focus: Black women (race and sex/gender reassignment), and Muslim women (religion and sex/gender reassignment). The law recognises that there are intersectional crossroads, but this is limited to a duality (only two protected characteristics). Section 14 of the Equality Act has been considered 'too complicated' and 'burdensome'[1] by the government to be applied to three or more different grounds, thus failing to even acknowledge issues of harassment. This in turn causes further problems when an individual in the workplace has to choose whether they are being harassed with respect to their race, sex, or religion. Failing to acknowledge that wearing a hijab is not only a religious based issue puts it under an umbrella rather than also acknowledging it as a gender-based issue as the hijab bears the very nature of one's identity as a Muslim woman.[2] Similarly, failing to acknowledge that wearing one's natural textured hair is not only a race-based issue but also a gender-based issue fails to recognise that such discrimination flows from the nature of being a Black woman. Moreover, it is because of this duality that they are experiencing harassment within the workplace, rather than simply one of the protected

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[1] Government Equalities Office, 'Equality Bill: Assessing the impact of a multiple discrimination provision' (April 2009) <https://data.parliament.uk/DepositedPapers/Files/DEP2009-1229/DEP2009-1229.pdf> accessed 18 April 2022.

[2] Wendy Greene, 'A Multidimensional Analysis of What Not to Wear in the Workplace: Hijabs and Natural Hair (2013) 8 FIU Rev 333.

characteristics. Thus, harassment in the workplace occurs due to the duality of being a Black or Muslim women rather than simply one of the protected characteristics.

To consider one protected characteristic in isolation is a deficiency of the law as it is failing to protect individuals who possess more than one protected characteristic: being a Black women or Muslim women. The law's failure to recognise intersectional issues adequately in turn effects the claims of harassment these intersectional groups can bring within the workplace, as if these issues are deemed as 'too complicated' how can we expect employers to be able to deal with these situations sufficiently? It is then Parliament's role to create laws that allow people to benefit from any injustices caused by such acts, include combining multiple protected characteristics; being available for harassment claims in addition to indirect discrimination claims. This reform would bring about an understanding of intersectional issues of harassment within the workplace and negate the number of claims, as it would indicate to individuals that these issues are serious, humiliating and degrading, and thus will make people more aware of harassment related issues within the workplace and other institutions.

Black women

We need more focus on harassment that occurs within the workplace. Whilst it is promising that hair discrimination has gained some acknowledgement, it should not stop there. The result of direct discrimination includes the feeling of not being good enough because your hair does not adopt a 'professional' westernised standard, together with the embarrassment and inability to express your cultural heritage through your hair. Black women's hair has been described as their 'crowning glory',[3] holding significant importance and weight. Article 10 of the ECHR contains the right to freedom of expression yet in practice, Black women do not have the ability to express themselves through their hair, as they are often harassed and vilified for it. Black women have and are continuously harassed with stereotypical perceptions disparaging their naturally textured hair as "messy", "unkempt", "dirty", and "unprofessional".[4] There are countless stories of Black women experiencing harassment within the workplace, from being told to "Wear a weave at work – your afro hair is unprofessional"[5] and comparisons to objects or animals that are dehumanising.[6]

These remarks create a hostile environment for Black women resulting in them not wearing their natural hair in a specific style. The negative comments are also extremely humiliating as it perpetuates a negative connotation of Black people being unhygienic and lazy.[7] Such comments serve no purpose other than to instil shame in them about their Blackness.[8] For Black women to experience these humiliating incidents supports the claim that the law is failing to regulate harassment at work.

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[3] Crystal Powell, 'Bias, Employment Discrimination, and Black Women's Hair: Another Way Forward' (2018) 2018 BYU L Rev 933.
[4] D Wendy Greene, 'Splitting Hairs: The Eleventh Circuit's Take on Workplace Bans Against Black Women's Natural Hair in *EEOC v Catastrophe Management Solutions*' (2017) 71 U Miami L Rev 987.
[5] Rozina Sini, '"Wear a weave at work – your afro hair is unprofessional' *BBC News* (UK, 15 May 2016).
[6] Jessica Morgan, 'These Black Women's stories Prove Hair Discrimination Happens Here Daily' *Refinery 29* (UK, 11 February 2020).
[7]Nicola A Corbin, William A Smith, and J Roberto Garcia, 'Trapped between justified anger and being the strong Black Women: Black college Women coping with racial battle fatigue at historically and predominantly White insinuations' (2018) International Journal of Qualitative Studies in Education 626-643.
[8] Jane Edwina, 'Halo Code' (October 2020) <htttps://halocollective.co.uk> accessed 22 March 2022.

Education in the workplace

There is a direct parallel regarding harassment at schools and the further maintenance of school policies. School hair polices which Black students and teachers have to follow, as well as teachers policing students' hair, creates a hostile environment which in turn further enables their peers, and even staff members, to tease, shame, embarrass and target Black students' hair.

If the law fails to recognise the danger of not highlighting and remedying the impact of harassment in early education, this follows into the workplace environment later in life where it becomes normalised. If the law begins to identify the issues within educational institutions, then the law will be better equipped to identify and more easily tackle harassment issues when they occur. Simultaneously will enable the individual who is being harassed to feel comfortable in the knowledge that the law will aid them when making a claim of harassment.

In hindsight, the law is failing to consider this type of harassment in the workplace. The way the law regulates harassment within education is ineffective, as the implementation of the polices is restrictive and breeds the notion that wearing your natural hair is an issue. Already from a young age, Black women are placed in an intimidating, hostile, degrading, humiliating and offensive environment that continues to cause discrimination due to the inadequate protection provided by the law.

World Afro Day Report

Research gathered from De Montfort University provides valuable statistics that provides some insight into the harassment that occurs within the workplace and educational institutions:

- 82.9 per cent of children experienced their hair being touched without their permission;[9]
- 46 per cent of parents say that their children's school's policy penalises Afro hair;[10]
- 58 per cent of Black students have experienced name-calling or uncomfortable questions about their hair at school;[11]
- One in five Black women feel societal pressure to straighten their hair for work.[12]

These statistics reinforce the idea that the law is failing to protect Black women against harassment, not only in the workplace but also in educational settings. The statistics do not expose the entire UK population, and thus the value may be skewed. However, the value that these statistics hold further highlights the issues within the law in relation to Black women and harassment within the workplace.

[9] Michelle De Leon and Denese Chikwendu, 'Hair Equality Report 2019: "More than just Hair"' (2019) <https://www.worldafroday.com/hair-equality-report> accessed 19 April 2022.
[10] Ibid.
[11] Ibid.
[12] Ibid.

The Halo Code

The Halo code is the first UK-based initiative that pledges to those members of the Black community that they have the "freedom and security to wear all afro-hairstyles without restriction or judgement."[13]

It is promising that the Halo Code exists, and that there has begun some focus on hair discrimination. The focus is in connection with harassment that exists alongside discrimination, and the code will protect against occurrence of harassment in the workplace, as its aim is to incorporate the Code into workplaces and education establishments. This will facilitate a proactive stand, that no member of the community will face barriers or judgement because of their Afro-textured hair. [14] Nevertheless, this is a rising, independent organisation that is not governed by the law. This suggests that the law is failing to regulate harassment in the workplace, as otherwise independent groups would not have to create a code to help individuals that suffer from a humiliating and hostile environment within the workplace.

It would be in the law's best interest to take this code and adopt it into formal, primary legislation, as it is important not only to ensure that everyone is included within the law, but to highlight that harassment in the workplace in relation to Black women and their hair will not be tolerated.

Workplace harassment – literature from the US

Several articles from the United States make it clear that Black women alter their natural hair or rather maintain it by straightening their hair because of an explicit or implicit term or condition of employment.[15] Moreover, employers have instructed Black women to cut off, cover or alter their natural textured hair in order to obtain employment for which they are qualified.[16]

The US has recently introduced legislation (considered below), which will make it unlawful to make individuals feel any type of humiliation, intimidation, and should create a beneficial and safe environment rather than a hostile one for Black men and women. This is a clear example of how the USA has attempted to regulate the law against harassment in the workplace.

The Crown Act

The US has recently passed legislation - the Crown Act (Creating a Respectful and Open World for Natural Hair), the Act prohibiting "discrimination based on an individual's texture or style of hair."[17] The USA has thus successfully passed legislation to more fully combat discrimination and harassment claims within the workplace. Although, the UK is showing signs of progression, nothing has yet become a specific law. True, there is protection against discrimination for protected characteristics, yet there are no specific provisions to protect Black people, or more specifically Black women in respect to their hair and the experiences that they go through within the workplace. Unlike in the US, there is no

[13] Jane Edwinal, 'Halo Code' (October 2020) <htttps://halocollective.co.uk> accessed 22 March 2022.
[14] Ibid.
[15] Wendy Greene, 'Splitting Hairs: The Eleventh Circuit's Take on Workplace Bans Against Black Women's Natural Hair in *EEOC v Catastrophe Management Solutions*' (2017) 71 U Miami L Rev 987.
[16] Ibid.
[17] Janelle Griffith, 'House passes the Crown Act banning discrimination against Black hairstyles' *NBC News* (America, 18 March 2022).

independent and effective legislation to negate any issues in relation with to discriminatory and humiliating treatment.

Muslim women

In a recent case, harassment was demonstrated in the workplace against a Muslim woman.[18] In this case, physical harassment was suffered by a Muslim woman, when her headscarf was pulled down by Mrs McGonigle, a work colleague, on two occasions. She had only admitted to doing it once, and she claimed that she was 'only messing around' and professed that the Muslim women looked 'prettier without it'. Rejecting the employer's claim, Judge Hallen stated that there had a breach of the policy on bullying and harassment due to a protected characteristic based on race or religion, which could constitute a disciplinary offence and lead to dismissal. Judge Hallen also identified that employees are entitled to be treated with dignity in the workplace.

This case questions the allegation that the law is failing to protect Muslim women in the workplace, and rather that the law has regulated harassment within the workplace effectively as it was identified as an issue of religious based harassment. However, the 'Neutrality Policy'2017 [19] may lead to further harassment claims within the workplace. This European Court of Justice Policy states that in some circumstances workplaces can ask Muslim women to remove their hijab if they work face-to-face with customers or if it causes conflict in the workplace. [20] Employers should be aware that dress codes should not interfere with an employee's right to manifest their belief, [21] unless it can be objectively justified. Further, in a case where religious crosses were not to be visible[22] or allowed in the workplace, such discrimination was held to contravene Article 9 ECHR. However, the issue remains that Muslim women will be put into a difficult position, whereby removing their hijab will cause them to feel violated and degraded as the request is based on religious reasons, and where they wear the hijab to maintain modesty and privacy.[23] This will also create an intimidating environment if they choose not to remove their hijab, again supporting the claim that the law has failed to effectively regulate harassment within the workplace. However, it is necessary to note that the law is not binding on UK tribunals and courts, and thus it will be at the discretion of the court to regard this policy or not.

Conclusions

As suggested above, the inclusion of the Halo Code as law would be beneficial for employees and employers, not only to acknowledge that there is a mandated law to protect against harassment, but also to require cultural competency training within the workplace. Cultural competency training would be advantageous for everyone within the workforce as well as educational institutes, allowing them to be aware, understand and learn about the cultural values and beliefs of the issues that Black and Muslim women experience.

The above research has demonstrated the both law's success and deficiencies. The law has been successful in regulating harassment at work as far as the definition provided with the Equality Act 2010, as well as dealing with general harassment claims. Further Judge

[18] *McGonigle v WM Morrison's Supermarket plc* [2021] UKET 3202627/2021.
[19] *Achbita v G4S Secure Solutions* [2017] EU: C: 2017: 203.
[20] *Müller v MJ* [2021] EU: C: 2021: 594.
[21] European Convention on Human Rights Article 9 - Freedom of thought, conscience, and religion.
[22] *Eweida v United Kingdom* [2013] ECHR 37.
[23] *Qur'an* : An-Nur: 31.

Hallen's judgment indicates that the courts are becoming aware of issues surrounding harassment and indicates that they will be dealt with sufficiently.

On the other hand, the law has failed to regulate harassment in the workplace specifically in relation to Black women and their hair. There seems to be a lack of understanding when dealing with these issues, hence a plethora of issues occurring within the workplace and in educational settings. The law has failed to include a provision that can benefit the Black community, such as the inclusion of the Halo Code. UK law fails to provide legislation such as the US, which demonstrates that the US are further ahead than the UK in this area. It is evident that this issue is not at the top of the current agenda, but it would be a beneficial piece of legislation to incorporate into UK law. Support for this issue is paramount, and the UK law needs to urgently work on this reform to help individuals, especially those that hold more than one protected characteristic, so that any claims of harassment can be dealt with effectively and appropriately. Otherwise, if the law continues to disregard dual or multiple protected characteristics, harassment will continue to occur in the workplace.

The duty of the law is to ensure that everyone is protected and can call on the law to help them. However, if this is not available for Black and Muslim women then the law's lack of protection will lead this demographic to believe that they are not important, in turn changing themselves as individuals to fit into what is normalised in order to prevent being harassed. This should not be the case; rather the law should be changed to diminish the re-occurrence of harassment claims in the workplace.